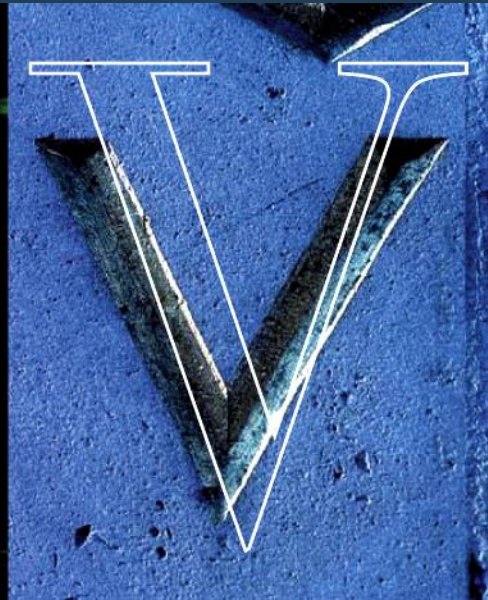
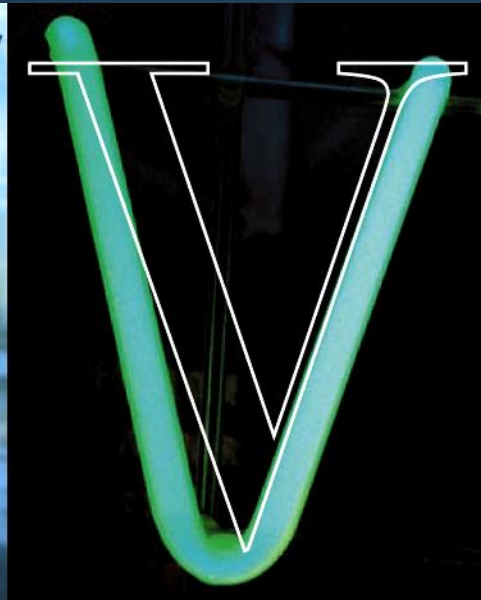
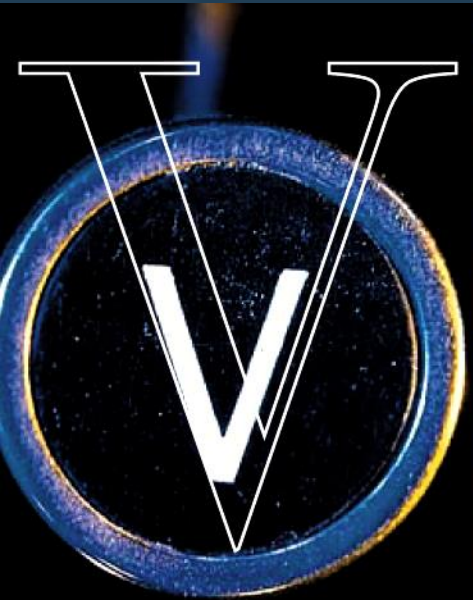


# VENABLE<sup>®</sup><sub>LLP</sub>

Hot Legal Issues Facing Independent Schools & Trustees:  
Lessons from the Front Line

Caryn Pass, presenter



# Topics

- |   |   |
|---|---|
| 1. Employee Issues                      | 1. Student Issues                       |
| 2. Safety and Security                  | 2. International Student Travel         |
| 3. Intellectual Property                | 3. Transgender students                 |
| 4. International Student Travel         | 4. Intellectual Property                |
| 5. International Students               | 5. Immunization and Infectious Disease  |
| 6. ERISA & deferred compensation        | 6. Employee Issues                      |
| 7. Transgender students                 | 7. Safety and Security                  |
| 8. Student Issues                       | 8. International Students               |
| 9. Parent Issues                        | 9. ERISA & deferred compensation        |
| 10. Divorce, Custody & Parental Turmoil | 10. Parent Issues                       |
| 11. Immunization and Infectious Disease | 11. Divorce, Custody & Parental Turmoil |

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# Student Issues

- **Behavior, Discipline & Code of Conduct**
  - Sexual misconduct/rape, sexting, bullying, drug/alcohol use, other use of social media
  - Parent challenges discipline process and decision
  - Update policy: include in handbook, enrollment contract, plaster on walls
  - 24/7 vs. “during school”, “review board,” appeal
    - Does board review decision?
- **Vet carefully**
  - Month and year of all previous schools
  - Reason for departure?
    - “sexual misconduct”, bullying, disciplinary
  - Current teacher, administrator recommendations
  - More carefully for international (cat skinner)
  - *Criminal background of parents*
- **Notice to colleges (before and after acceptance)**
- **Report reason for departure to next school**



# international student travel

- **Recent cases shed light on legal exposure**
  - 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
    - Failure to vet 3<sup>rd</sup> party
    - *Documented relationship with 3<sup>rd</sup> party*
    - Documented relationship with family
  - Run by School
- **Carefully Drafted Travel Documents**
- **Reasonableness of field trip and activity**
  - Kindergarten white water rafting trip?
  - High School students traveling to Cuba?



## transgender students

- **Discuss and consider issues and school's approach, develop guidelines**
- **Younger students each year** (kindergartners)
- **Issues to consider:**
  - Bathrooms (non-gender bathrooms)
  - Locker rooms
  - Sports
  - Single sex schools
    - Girl's schools allow transgender boy?
  - Name change
    - during school
    - official transcripts (current and former)
    - use of pronoun (he,she,they)
  - Boarding room arrangements
  - Field trip room arrangements



## intellectual property

- **Protect name, logo, likeness, "tag line", program**
  - Represents school's "brand"
  - Alternative revenue sources (international)
  - Protect in and outside of U.S.
  - T-shirts, new school, program of "School", international schools trading on name
- **Use experienced lawyer**
- **Notify parents, students, faculty other "vendors"**
- **Agreement with faculty, students, 3<sup>rd</sup> parties**
  - Use/ownership of intellectual property
- **Language in enrollment contract, teacher's contract, all handbooks, materials sent to parents, vendor contracts**
  - **ESPECIALLY INTERNATIONAL STUDENT VENDORS**



# immunization and infectious disease

- **Create written policy**
- **Must be fully immunized unless:**
  - “Genuine and sincere religious belief”
    - Proof = letter from “clergy”, publication, materials, other documentation
    - Other children or parents not immunized
    - Organized church not mandatory
    - Can request additional proof
  - Medical condition
    - Certification from state licensed medical provider
    - Detrimental to child’s health condition
    - Length of time immunization delayed
- **Infectious disease**
  - Sick child should not attend school
  - Work with local health officials to determine if non immunized may attend



# employee issues

- **Wrongful Termination**
  - Based on protected category
    - race, age, sex, national origin, disability
  - Breach of employment contract/agreement
  - Handbook non-compliance
- **Reduction in staff**
- **“Protected Speech” under the NLRB**
- **Application and selection process**
  - Injury resulting from failure to properly vet
    - Criminal background check reflected past history of inappropriate contact with minor
- **Inappropriate contact with minors**
  - Conducting training with employees
    - actual misconduct and appearance of misconduct





## 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?
- **Board establish risk management committee**
- **Conduct security audit**
  - 3<sup>rd</sup> party review & report with Emergency preparedness policy
  - Legal counsel engagement: Attorney client privilege



# 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



## ERISA and deferred compensation plans

- **IRS watching closely of late**
- **Church school classification & 403(b) misuse**
- **Use of 457(b)**
  - Mandatory maximum, no “catch up”, only highly compensated eligible (\$115 or higher), fund each year
- **Use of 457(f)**
  - Only board contributes, risk of forfeiture essential, payout at vesting, get help drafting plan (unwinding is painful)
- **Tuition remission**
  - Same benefit to all or taxable income
  - Head receives greater than policy amount
    - Entire remission taxable income
- **School contribution to 529: Taxable Income**



## parent issues

- **Vet carefully**
  - Criminal background of parents
  - Conviction for inappropriate contact w/minor
    - Notice to parent body? Set rules?
  - Interview for “crazy” factor (ask former school)
  - Google search
- **Issues of fitness**
  - Drug/alcohol use or mentally unstable
    - Notify other parents?
  - Inappropriate contact with students
  - Harassment or inappropriate treatment of faculty
- **Conflicts b/w parents**
  - Parents with conflicts and impact on students in the classroom and school
- **Reporting abuse to children services**
  - Notify of school’s obligation & procedure



# divorce, custody and parental turmoil

- **Parent(s) access to student and school**
  - Attend events? Pick up? School notices?  
Communicate with faculty?
  - Access to report cards, attendance records?
  - Custody orders
- **Responding to subpoenas & guardian ad litem**
  - Confirm valid subpoena (privacy violations)
  - Notify faculty
    - Give subpoena to school
    - Do not speak with any lawyers
    - Don't make promises to parents
- **Enrollment contract**
  - Cost to school including legal fees, collection of documents, testimony of faculty
  - Disruption to school grounds for removal
    - Fighting, involvement in legal matters



## 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



## 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 - general

- 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?



# Format for selection of board members

- Governance committee
  - Who appoints the committee
  - Same system as other committees?
  - Former chair transitions to Committee Chair
- Governance vs Committee on trustees
  - Role and responsibilities
    - Selection of trustees
    - Selection of officers
    - Review of trustees
    - Removal of trustees
      - receives and investigates complaints, reports to board, makes recommendation
      - TRUSTEE LEAVES DURING DELIBERATION



## selection of board members

- Trustees vs. Directors
- Number of Trustees on Board
- Selection of board members
  - Fixed skills or open spots
    - Design for needs of board
  - Who selects the candidates
    - Governance Committee, board in general or community
    - Level of Head of School participation
    - Can community make suggestions?
  - Interview process and vetting
    - Is there an interview process, who performs
  - Presentation to the board



## voting and term limits

- Voting for board members
  - If membership or community involvement
    - One vote/family
  - Slate vs. individual nominees
  - Nominations from the board at meeting
  - Percentage vote needed
- Rotating terms
  - % of trustees that roll off each year
- Term limits of trustees
  - Years per term
  - # of terms can serve
  - Break between terms
  - Honorary trustees



# leadership

- Board chair and other officers
  - Chair
    - unlimited vs. fixed term
    - 2 or 3 years? 1 year with renewal?
    - Who selects? Board, Governance committee?
    - Succession planning
      - Vice chair becomes chair?
  - Other officers
    - What positions exist?
      - Secretary, vice chair, treasurer,
    - Term limits?
    - Does term suspend during service
    - Can term extend if in leadership role





## votes, attendance & notice

- Percentage of votes needed for various decisions
  - What decisions are most vs. least important
  - Votes for:
    - removing trustee, employing and terminating head
  - Not established default to state law or Robert's rules
- Attendance
  - Meeting by phone or skype
  - Consequence of not attendance
- How are votes allowed
  - By proxy
  - Email Votes
- Notice to trustees
  - By email, letter, phone
  - Emergency meeting rules



# committees

- Committees
  - What committees established
  - Creation of new committee?
    - Who can establish, what is needed to establish
  - Role of each committee
- Executive committee
  - Decisions between meetings
  - Regular meetings
  - With head of school
  - Creation of agenda
  - Plans for the year
- Head's committee
  - Evaluation of Head
  - Transition for new head
  - Work with executive coach



## other issues

- 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
    - Intermediate sanctions obligations
    - 990 presentation to board
- Directors and Officers insurance and indemnification
  - Amount of coverage?
- Make up of board
  - Faculty? Student? Alumni officer? PTA officer?  
Non-parents? Other head of school?



# Policies

- Charter and articles of incorporation
- Whistle blower policy
- Document destruction and retention policy
- Intermediate Sanctions Policy
- Audit Policy
- Investment Policy
- Conflict of Interest Policy
  - Process for vetting conflict
  - Disclosure of conflict
  - Annual execution by trustees, head and cfo

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## 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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Venable Independent School Law Practice  
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[www.Venable.com/education](http://www.Venable.com/education)

@schoollawyer

Caryn Pass

[cpass@venable.com](mailto:cpass@venable.com)

(o) 202.344.8039

(o) 212.307.5500

(c) 202.222.8026

Megan Mann

[mmann@venable.com](mailto:mmann@venable.com)

(o) 202.344.4520

(o) 212.370.6260

(c) 917.597.1705

**New York Office:**

1270 Avenue of the Americas  
New York, NY 10020

**Washington, D.C. Office:**

575 7<sup>th</sup> Street, N.W.  
Washington, D.C. 20004

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