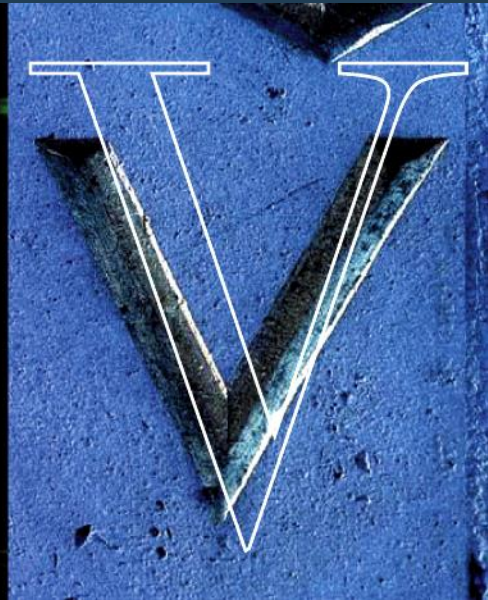
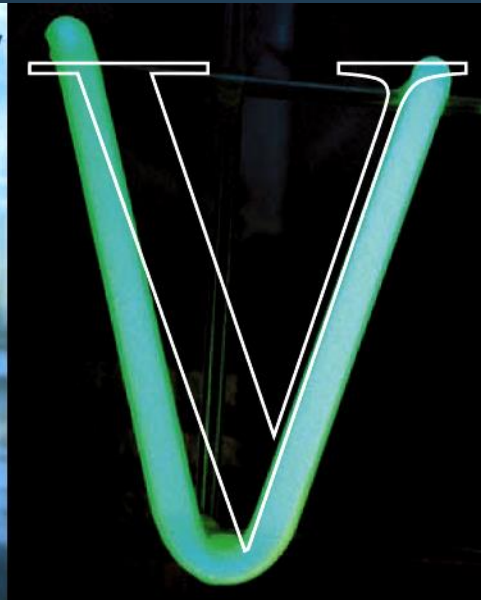
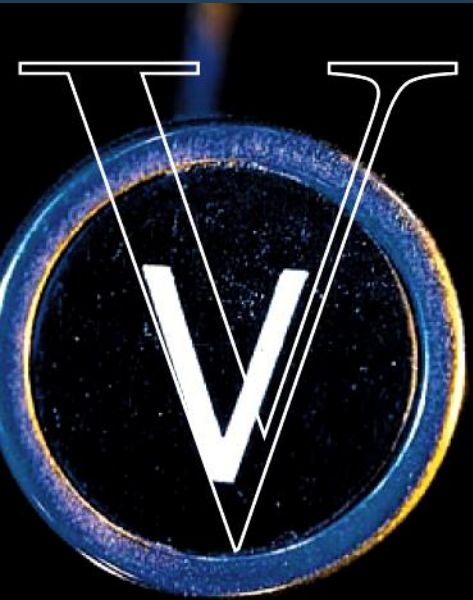


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Hot Legal Issues Facing Independent Schools: Limiting Exposure Through Proactive Strategies

2016 Trustee Governance Conference
Caryn Pass, Esq.



overview

- “Zero” risk is a myth
 - limit liability exposure by being proactive
 - policies, procedures and protocols that reduce risk
- risk assessment continuum
 - is the benefit worth the risk?
 - upsetting the parent to protect a student
 - electric fence
 - expense of fence worth the protection it provides
- make certain to coordinate all documents
 - handbooks, enrollment contracts, applications
- culture is king
 - acting outside of culture is recipe for disaster
 - “acceptable behavior” in *OUR* school
- # 1 priority is safety and security of students
- failure to consider safety of students = negligence
 - tragedies nationwide place schools on “notice”
 - failure to address risk, resulted in injury

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topics

- policies and governance documents
- transgender and gender fluid students
- changes to the FLSA (Wage and Hour)
- alumni allegations of sexual abuse
- student safety
 - student vetting, student behavior, disciplinary policies and procedures, international trips
- adult safety
 - hiring employees, vetting parents, parent behavior
- mandatory campus housing



policies and governance documents

- failure to draft and review creates exposure
- key documents
 - charter and articles of incorporation
 - bylaws
 - 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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transgender and gender fluid students

- first lawsuit filed by parents and 18 year old student
 - refusal to allow entry to girls bathroom
- evolving on a daily basis
 - recent bathroom cases encouraging challenges in independent schools
- students self identifying as:
 - transgender, gender non-conforming, gender fluid
 - other gender based identities
- identifying at younger ages (Kindergarten common)
- acceptance implies creation of safe space
 - fully and safely incorporate into the school community
- culture and mission critical to strategy
 - religious schools
 - single sex schools
- board and parents highly involved
 - strong feelings impact actions
 - pants suit vs Neiman Marcus Selected Dress = Termination of HOS



employees entitled to overtime pay

- employees work over 40 hours in a work week
 - time and ½ of regular rate of pay
- requirements for exemption from overtime payment
 - salary level
 - currently paid at the minimum rate of \$455/week
 - salary basis
 - paid same amount each week regardless of # of hours worked
 - duties
 - meet qualifications of exempt category
 - *executive, administrative, educational establishments administrative, professional (teacher)*
 - actual duties performed by the employee
 - not just as described in the job description
- not relevant
 - access to confidential information
 - acts like a professional
 - board secretary



changes to the FLSA (wage and hour)

- only impacts minimum salary requirement
 - currently **\$455** per week; **\$23,660** annually
 - proposed **\$913** per week; **\$47,476** annually
 - effective date december 1, 2016
 - texas case stayed implementation
 - waiting for court results
 - impact by new administration unclear
- employees meet duties but not NEW salary minimum
- employees fail duties test
 - advancement, admissions, secretaries
 - work long hours
- review positions classified as exempt
 - do they meet salary basis minimum
 - increase salary?
 - do they meet duties
 - modify job duties



changing from exempt to non-exempt

- employees often “offended”
 - perceived as “unprofessional”
 - tracking time is often the issue
- cost benefit analysis
 - law requires overtime payment
 - employees upset if status changed
 - financial liability for failing to compensate overtime
 - liability for cost of non-payment vs. employee morale
- challenges
 - retroactive or only going forward
 - employees question why not retroactive
- strategies for change
 - result of change in law
 - identify other changes planned (benefits, handbooks)
 - roll out as one package
 - sell as a positive



alumni allegations of sexual abuse

- numerous reports by alumni around the country
- types of schools
 - boarding and non boarding
 - lower, middle and high school
 - single sex and co-ed
 - parochial and non affiliated
- often dating back to the 60's and 70's
- reporting by email, letter, calls, social media
 - Facebook, survivors websites, blogs
- keep up to date
 - read “Great is the truth”
 - boston globe articles
 - spotlight investigation
 - survey to schools threats for failure to respond
- reports of abuse in past ignored
 - discovered once complaint raised
- no one is immune



legal claims and considerations

- **statute of limitations**
 - how long does the survivor have to file a claim
 - against abuser: 5 years from 18
 - against school: 3 years from 18
 - challenges in NY to statute of limitations
 - eliminate or fixed window of time
- **against school by survivor**
 - respondeat superior
 - school has responsibility for actions of employees
 - negligent hiring
 - school failed to properly vet employee pre-hire
 - employment of dangerous individual
 - negligent supervision
 - school failed to properly supervise employee
- **by school against school for recommendation**
 - school relied upon positive recommendation
 - failure to disclose inappropriate behavior



engage professionals

- identify before crises occurs
 - don't want to be looking in middle of crises
 - learns culture of school: hit ground running
- engaged by legal counsel
- professional team
 - attorney
 - represents the school
 - appointment by insurance (who selects counsel)
 - investigator
 - transparent, independent and complete investigation
 - knowledge of abuse
 - abuse by other employees
 - no relationship to school, board members, other school employees, attorney for school
 - crises management firm
 - assists with strategy, press, communications
 - drafting of statements



review policies and procedures

- **policy on reporting abuse**
 - to child protective services and or police
 - reports from parents, students, employees
 - consider role and responsibility of school counselor
 - internal reporting of issues
 - central location that monitors concerns
- **policy on internal investigations**
 - procedure for conducting investigation
 - maintaining interview notes and other documents
 - drafting of investigation results
- **establish proper boundaries, behavior and standards of performance**
 - social media, meeting students one on one, inviting students to home
- **training of employees, students, parents**
- **create crises management plan**
- **review hiring policies**
- **procedures for supervising and evaluating employees**



proactive request for information on abuse

- draft and distribute letter
 - not aware of allegation
 - in light of many claims reported in schools
 - in support and protection of community
 - encourage the reporting of all incidents of abuse
 - engage investigator to receive complaints
 - notify of current policies and procedures for protecting students
- allows for planned response
- shows concern for community and alumni
 - survivors appreciate efforts
- limit liability through good faith efforts
- consider timing of letter
 - middle of capital campaign
 - decreased enrollment
 - removal of head of school



student vetting

- create safe and secure learning environment
- admit only safe students
 - vet applicants carefully prior to admitting
- student injured by fellow student
 - student not admitted if properly vetted
- history (on application and in interview)
 - all education history not just last 2/3 years
 - reasons for departure
 - eligible for return
 - withdraw or dismissed
 - agreement reached with school?
 - carefully review dates of attendance
 - day, month and year of attendance (September 5, 2016 to June 8, 2016)
 - not just school year (2015-2016 school year)
 - specifically inquire into disciplinary issues
 - what is considered “discipline” worthy
 - does school report to college
 - what type of discipline and basis for discipline
 - suspended for cheating
 - inquire into gap in attendance

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additional student vetting

- Google, Facebook and other social media search
 - photos, links or other references
 - reflect upon student and will reflect upon school
 - a few schools ask applicants to log onto Facebook page

- teacher recommendations
 - teachers that know student
 - current teachers may not be best
 - ensure honest recommendation
 - parent and student waive access
 - only valid if signed by parent (over 18 student)
 - mailed/emailed or online directly from teacher

- administrator recommendation
 - fuller story on student
 - reason for departure, allowed to return, disciplinary history, discipline on transcript
 - speak to administrator if possible



final student vetting

- interview student
 - in person or via Skype
 - make certain applicant is one that shows up at school
 - if on campus obtain details of applicant first
 - especially in boarding school overnight visit
- vetting especially important with international students
 - great candidates and important to many schools
 - more difficult to vet and greater exposure
 - students coming to states as a result of behavior in home country
 - often recommended by third party
 - we are responsible for conducting our own vetting
 - relying on third party doesn't protect school
 - confirm process used by third party
 - especially in home stay or non-boarding situations
 - may or may not be monitored as closely



addressing student behavior

- consider physical plant and other locations students visit
 - stairwell, far off areas on campus
- draft disciplinary policies and procedures describing
 - appropriate student behavior
 - school expectations (privilege not right to attend)
 - whether 24/7 or during school day/school activities
 - investigation process
 - who conducts, notes, parent notification
 - disciplinary process including
 - hearing or due process procedure and appeals process
 - students involved
 - exceptions to policy
 - consequences of behavior
 - types of disciplinary action; reporting to college
- communicate clearly to students, parents and employees
 - in student handbook, enrollment contract and agreements with students
 - training, talking, reviewing, repeat



overnight trips: local and international

- establishing a clear program that establishes process for designing a trip
 - from start to finish
 - make sure every trip follows the guidelines
 - communicating expectations clearly
 - does discipline apply during the trip
 - does school hold students accountable for their behavior while on trip
 - identify points of risk
 - sleeping arrangements
 - camping arrangements
 - home stays
 - times students are on their own unsupervised
 - when drinking is allowed
 - chaperone student ratio
 - vetting of school partners and policies of the school related to student behavior

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vetting employees: hiring procedures

- carefully review entire process
- use application
- consider central oversight to ensure consistency
- criminal background checks
 - state obligations are floor
 - include social security check
- sexual offender registries
- loss of teaching license (Often method for addressing questions of abuse)
- references:
 - date and time of call, telephone number, name of reference, notes of conversation, if message was left
 - former employers and other non identified references
 - any concerns or allegations of inappropriate contact with students
- social media check



head of school housing

- must meet “mandatory criteria”
 - Housing on campus, condition of employment, benefit/convenience of the school
- benefit of school: regular use for entertaining or other school activities
 - Meetings with faculty, staff or students
 - Entertaining parents, donors, “friends of the school”
 - Fundraising events
- track use by head of school
- include details in HOS employment agreement
 - describe “mandatory criteria”
 - timeline for removal of head in various conditions
 - termination with cause, without cause, death, disability
 - not “lease” or “rental” relationship;
 - consider if head and spouse divorce (spouse may have rights to housing pursuant to court order)



language for employment agreement

- **General Criteria:**
 - As a condition of employment, Educator will be required to live on campus in the housing (“Campus Housing”) provided by the school in order for Educator to properly perform the responsibilities of his/her position.

- **Removal of Employee After Termination:**
 - If Educator’s employment ends for any reason or, in the sole discretion of the School on campus housing is no longer appropriate, he/she will/may be required to vacate Campus Housing within X days of the last day of employment.

- **Who May Live In Campus Housing:**
 - Only the Educator may live in Campus Housing under this Agreement unless permission is given in writing by a School authorized agent to allow an individual other than the Educator to live with the Educator. Such permission may be revoked by the School at any time for any reason as determined by the School in its sole discretion and the individual will be required to vacate Campus Housing.

- **NON MANDATORY HOUSING: (CONFIRM WITH STATE LAW)**
 - Educator agrees and acknowledges that this Agreement does not serve as a lease or give Educator a leasehold estate. Neither Educator nor any individuals living with Educator in Campus Housing is/are tenants of the School. Employee waives in his/her behalf and those that may reside with him/her in Campus Housing any and all notices to vacate the Campus Housing as may be required by the law.
 - (CONSIDER ENTERING INTO A LEASE AGREEMENT)



inviting safe parents (other adults) into community

- exposing students to safe parents (other adults)
 - parents
 - grandparents, home stay parents, other visitors
 - school's failure to vet parent/adult exposed student to injury
 - what is school's duty?
 - what is reasonable?
 - in the case of injury: is the school comfortable describing process followed?
- entry to physical plant
 - ID offender scanning check
 - identifies those on sex offender registry
 - include other "no-access list"
 - i.e. ex-employees; abusive parents
- parents with criminal backgrounds
 - sex offender violations vs. other criminal convictions



parent vetting considerations

- when to conduct check
 - admissions process and/or during course of enrollment
- await notice vs. request information
 - community member comes forward or affirmative check
- in admissions process
 - request information in: enrollment application; teacher recommendations; interview with former school; interview with parents
 - question on application:
 - parent or other adult associated with this applicant convicted of a crime involving inappropriate contact with a minor
- conduct background check
 - history of reports to child protective services
 - Google search
 - criminal background checks (written permission)
 - check sex offender registries (no permission)
 - national and local
 - require as condition of application



vetting international families

- in admissions process
 - confirm parent is completing application
 - request detailed information about parents if using third part to identify students
 - confirm living and or guardianship status of student if not on campus boarding
 - adult associated with this applicant convicted of a crime involving inappropriate contact with a minor
- possible Skype or in-person interview
 - difficult and expensive to obtain criminal background
- obtain source of home stay family
 - Interview home stay “family” and visit home
- conduct background check on local guardian/homestay
 - history of reports to child protective services
 - Google search
 - criminal background checks (written permission)
 - check sex offender registries (no permission)
 - national and local
 - require as condition of enrollment



parents on sex offender registry

- wide range of responses
- establish acceptable and non-acceptable behavior
 - sex offender registry vs. conviction for violent behavior
- possible strategies
 - take no action
 - prevent students from enrolling
 - allow enrollment with restrictions
 - not on campus or at any school event
 - accompanied by chaperone while on campus or school event
 - no sleepovers; play dates; parties or other interactions at offender home
 - no contact on or off campus or during or outside of school events
 - notify community (class or entire school)
- agreement in writing with family as condition of enrollment



responding to parent behavior

- types of behavior
 - coming to school under the influence;
 - threatening or abusive outbursts;
 - confusion or disorientation
- claim of negligence
 - school withheld information that would have impacted parent’s decision making
 - avoid play dates; car pools; other activities
- school’s duty to act
 - prevent “compromised” parent from accessing school
 - prevent parent under the influence from driving own or other children when impaired (car pool)
 - communicate with impaired parent or other members of the family
 - often other members of family not aware of behavior
 - limit access till behavior improves
 - Continued behavior may impact enrollment
 - notify parents of other students (attention to privacy)



other parent activities

- parents driving during school events (field trips)
 - track driving records; confirm insurance coverage
- parent's personal use of school directory
 - place community on notice not to use directory
 - confirm consequence of abuse
- parent use of logo, slogan or other intellectual property
 - ensure name, logo slogan etc. protected
- “drinking” parties hosted by parents
 - states holding parent's legally responsible
- parent association and other recognized organizations
 - school sponsored and “controlled”
 - “funds” monitored by school
 - school oversight of list serves, websites, activities
 - school has responsibility for activity of organization



conflicts between parents: divorce and custody

- parents increasingly pulling schools into conflicts
 - requiring teachers, faculty and others to testify
 - demanding emails, information and documents
- avoid involvement at all cost
 - do not take sides (remind faculty repeatedly)
 - do not know what happens at home
 - exposes school to liability for misrepresentation
- require parents to resolve dispute
 - ask for custody order or other documentation of status
 - continued disruption shall lead to removal
- do not speak with attorney or other “representative”
 - instruct all employees:
 - not to speak with lawyer or other representative
 - may or may not actually represent parent
 - parent may or may not have right to information
 - breach privacy of student
 - notify administrator of call, contact or subpoena
- language in enrollment contract requiring payment for costs



Parent Cooperation:

The School may take all action necessary to ensure the operation of the School in all matters as it may apply to the Student. A positive and constructive relationship between the School and Parent or other adults interacting with the School and/or School community by virtue of their relationship with the Student is essential to the mission of the School. Thus, if the behavior, communication, or interaction on or off campus (including during School-sponsored events) of Parent or other adults interacting with the School and/or School community by virtue of their relationship with the Student is disruptive, intimidating, overly aggressive, or reflects a loss of confidence or serious disagreement with the School, including but not limited to disagreement with its policies, procedures, responsibilities, personnel, leadership or standards, or imperils accomplishment of its educational purpose or program, Parent understands and agrees that the School has the right to dismiss the Student and/or the Student's family from the School community. In addition, Parent understands and agrees that the School has the right to place restrictions on that party's involvement with or activity at the School, on School property, or at School-related events if the party engages in behavior that the School determines in its sole discretion to warrant such a restriction.



Cost of Participation in Court or other Legal Proceedings:

If the Parent fail(s) to make any payment(s) under this Enrollment Contract when due, and School undertakes collection efforts to collect the payment(s) (including but not limited to efforts in house, with the assistance of third parties, or through legal action), the Parent agree(s) to pay all expenses incurred by the School, including collection costs and/or legal fees, in the event the School prevails. In the event of a dispute between the School and the Parent regarding tuition, fees, or charges of any kind, the School shall be entitled to recover the costs incurred by the collection of payments including but not limited School's attorneys' fees and costs incurred in such a dispute.

If, as a result of the School's relationship with the Student, the Parent, or other person(s) interacting with the School and/or School community by virtue of their relationship with the Student, the School or any member of its faculty or staff is required to testify, provide information for, or otherwise participate in a legal dispute to which the School is not a party, the School shall be entitled to recover from the Parent the School's attorneys' fees and costs incurred in such legal action and costs incurred by the School as a result of the collection of documents, coverage of faculty, staff or others absent from classrooms or other School responsibilities or other associated costs.



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