

Hot Legal issues Facing Independent Schools: Reporting from the front line

ISAS 2019 Fall Heads Meeting
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- **perspective and approach**
 - track trends
 - strategy = achieve goal with least legal exposure
 - set up vs. dig out

- **“Zero” risk is a myth**
 - limit liability by being proactive
 - policies, procedures and protocols that reduce risk

- **risk assessment continuum**
 - is the benefit worth the “risk”?
 - risk of legal action vs. benefit to school
 - termination of bad math teacher

- **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”

- **Boards**
 - Concerned about financials and other challenges
 - Demand immediate solutions to problems
 - Eager to overstep
- **Students**
 - Acting out in ways never seen before (language/acts of racist nature, sexual misconduct, cheating/bullying)
- **Employees**
 - Boundary crossing, lack of good judgment when interacting with students, on going/long standing poor performance
 - Failing to call out colleagues
- **Parents**
 - Challenging discipline, grades other behaviors
 - Behavior outside of school
- **Schools**
 - Not responding to employee/student/parent behaviors
 - Not taking proactive steps (training, vetting faculty/students)



Boards

- confidentiality issues
 - communication in and out of board meetings
 - danger zones = talking to your spouse after board meeting, getting in the pick up or drop of line at school
 - primary cause of legal actions
 - breach resulted in injury to school
- overstepping by trustees
 - engaging in operations or acting outside scope of duty
 - acting during change in leadership
 - pending departure of head, long standing head departs, new head arrives
- “bad behaving” trustees
 - acts contrary to interests of school
 - calling for rally against the school
 - bullying coach/faculty
 - threatening to have employee terminated
- review of key documents
 - **bylaws, conflict of interest policy, code of conduct**

Review of Concerns Involving Board Members

The Board Governance Committee is responsible for the **review of allegations made against individual Board members**. Members with reasonable belief that a fellow Board member has acted in a manner which would serve as the basis for removal may file a complaint with the Board Governance Committee. The Board Governance Committee shall conduct a **careful and complete investigation of the complaint**. Should the Board Governance Committee conclude that no violation occurred, the findings shall be reported to the Board. Should the Board Governance Committee determine that a violation took place; **the Board Governance Committee shall report the findings to the Executive Committee and recommend appropriate action up to and including possible removal from the Board**. The Executive Committee shall report the Governance Committee's findings and recommendation to the Board. The report shall take place in Executive Session. **The Board shall consider the findings and recommendations of the Board Governance Committee and determine what, if any, additional action is appropriate under the circumstances.** At the discretion of the Board, the Member under review may be required to leave the meeting during discussions of the matter and may be permitted to appear before the Board to address the complaint against him/her.

Removal of Board Members

Any Board Member, including Ex Officio members, Elected Directors, and Directors Emeriti, may be removed from the Board with or without cause upon recommendation of the Executive Committee and/or the Board Governance Committee, at any meeting of the Board, by an affirmative vote of two-thirds of the Elected Directors. The vote for removal shall take place in Executive Session. The Board Member under consideration for removal may be dismissed from the Executive Session during the discussion and or deliberation of the recommendation. The Member under review may be permitted to appear before the Board to present his/her objection to the recommendation. For the purposes of this Section, "cause" shall mean any of the following: (1) absences from Board meetings two or more times within a 12-month period; (2) breach of the Member's fiduciary duty to the School; (3) repeated failure to carry out assigned responsibilities from the Board of Directors or a Committee of the Board; (4) conduct which is determined by the Board Governance Committee to be: i) detrimental to the reputation, mission, or operation of the School; ii) detrimental to the Board of Directors; iii) in violation of the obligation to maintain the confidences of the Board; iv) in violation of the Board's Conflict of Interests policy; or, v) contrary to a Member's obligation to adhere to his/her duty of loyalty, obedience and care. Item (4) of this section shall include conduct by the Member and the conduct of persons associated with the Member who have interaction or affiliation with the School by nature of their relationship to the Member.

- leveraging position for personal benefit or gain
- financial conflict of interest
 - could adversely impact judgment when making decisions
- Conflict of Interest Policy
 - signed each year by each trustee, head & CFO
 - non-trustee committee members
- What is considered a conflict of interest?
 - Parents deciding tuition?
 - Parent of lacrosse star discussing expanding lacrosse program?
 - Using trustee's employer as investment firm without trustee's financial gain?
 - Using donor information for benefit of another entity? (soliciting donor for personal business)

- Developing policy for transgender students?
- Changes to languages taught at the school?
- Termination of a teacher?
- Termination of a teacher accused of sexual misconduct?
- Discipline of a student accused of cheating?
- Creation of student disciplinary standards?
- Policy on reporting discipline to college?
- Hiring of advancement director?
- Standards for admissions to school?
- Access to school by parent on sex offender registry?
- Calling the school's counsel related to an employee issue?

- Salary increases to faculty?
- Tuition increases?
- Engaging legal counsel?
- Modifications to benefits plans?
- Removal of a sports team?
- Allegations of sexual abuse raised by alumna?
- Choice of accrediting agency?
- Whether Advanced Placement classes are offered?
- Decision to conduct security audit?
- Mandatory report of abuse made against a teacher?



Schools

antitrust violations

- avoid collusion between competitors
- restrains commerce
- promote healthy market place
- DOJ has been focusing on higher education
- Examples of possible violations
 - failure to enroll if outstanding debt to other school
 - agreement not to employ if under contract
 - notification prior to interviewing current employee, student
 - fixing tuition/fees above floor
 - first choice letters
 - agree not to release ACT/SAT scores
 - school placement professionals
- DOJ turning to independent schools
 - Clear indication that there are concerns
 - States may begin to consider actions and investigations

- both covered under the ADA and applicable state/local law
 - treated differently
- Bottom Line:
 - **Service Animal**: restricted in what can ask and prohibit
 - **Support Animal**: conduct an individualized assessment, like any other reasonable accommodation request
- If **not obvious** that the dog is a service animal, you can ask:
 - Is the dog a service animal required because of a disability?
 - What work or task has the dog been trained to perform?
- *Do not ask for: 1) documentation; 2) require that the dog demonstrate the task ;or 3) about the nature of the disability*
- U.S. Department of Justice; Civil Rights Division *Disability Rights Section*
 - Frequently Asked Questions about Service Animals and the ADA:
https://www.ada.gov/regs2010/service_animal_qa.html#exc



Employees

addressing current concerns of employee misconduct

- responding to current allegations of misconduct or abuse
 - internal investigations
 - procedure for conducting investigations, maintaining interview notes and other documents, drafting of investigation results
 - treatment of current faculty accused of abuse
 - pending results of investigation (leave of absence?)
- establish boundaries, behavior and standards of performance
 - social media, meeting students one on one, inviting students to home, texting
- training of employees, students, parents
- vetting procedures for parents, students, employees
- procedures for supervising and evaluating employees
- mandatory reporting
 - to child protective services and or police
 - compliance with state law
 - internal reporting of issues

vetting applicants for employment

- obligation to expose students to safe adults
- consider best practices in hiring
 - inclusion in accreditations
- **create hiring policy**
- criminal background checks
 - state obligations are floor, consider using third party, periodic background updates, require notice if issue during employment
- sex offender registries in multiple states
- loss of teaching license
- 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
 - allegations of inappropriate contact with students
- social media check
 - consider checking social media sites
 - reflects judgment and behavior of applicant

- record levels of political activism
 - during Kavanaugh became especially relevant
 - behavior of employees after presidential election
- first amendment rights
 - First Amendment Free Speech only refers to **government** suppression of free speech
 - agree to temper their exercise of the right to free speech when they accept employment with that organization
- be cognizant of anti-discrimination issues
 - exercise of political activism can encroach on the anti-discrimination laws, depending on the nature of the activity *i.e. black lives matter*
 - employees have the right to work in an environment that is free from discrimination and harassment
- instructions to employees and creating policies
 - be respectful, be courteous, be civil
 - avoid vulgar language or destructive behavior
 - modeling behavior to students

- Increase in claims around the country
 - Statute of limitations is opening around country
 - Substantial payments made
- all types of schools
 - not just boarding
- alumni claiming abuse by faculty, staff, students
- reports made by email, letter, calls, social media
 - social media, survivors websites, blogs
- strategy for responding to allegations
 - previously little was done
 - current trend
 - investigation after notification to community and follow up actions
- keep up to date
 - read “Great is the truth”
 - boston globe articles- spotlight investigation
 - NAIS/TABS draft document

- **proactive planning before crises occurs**
 - no scrambling in middle of crises
- **establish *task force***
 - administrators, trustees
 - attorney client privilege (on committee)
 - determine authority
 - bylaws
 - vote of the board
 - consistent with level of transparency vs confidentiality
- **create a crises management policy**
 - role of the board/notice to board
 - steps followed when report or notice
 - list of tasks and steps to consider
- **insurance**
 - at time of offense
 - retain plans
- **select experts to support school**

- **considerations in selecting professionals**
 - Extensive experience in independent schools
 - Experience in abuse matters
 - cost is factor
- **attorney**
 - ***represents the school***
 - provides general advise
 - engages other professionals
 - Interfaces with investigator
 - assists in crises management team
 - addresses insurance issues
 - ***lawyer appointed by insurance***
 - who selects counsel
 - experience in defending abuse claims
- **investigator**
 - “transparent, independent and complete” investigation
 - no conflict of interest
- **crises management firm**
 - assists with strategy, press, communications, reputational protection



Students

- Changes in student behavior
 - Many allegations of sexual abuse and misconduct
 - Standard of behavior and definitions are complicated
 - What is “CONSENT”?
 - How does it change if alcohol is involved?
 - Responding to issues in society
 - Use of the “N” word
 - Depiction of blackface
- Student activism has impacted response by school
- Social media and technology use has changed way behavior occurs and is communicated
 - Media can take an issue out of the hands of a school
 - Impacts *reputation* of the school
 - Impacts school’s response
 - Parents demand immediate action
- Use of artificial and illegal substances and vaping
- Review code of conduct and disciplinary procedures
 - Increase in challenges by parents and by students
 - Reporting to college impacts response

- **student injured by fellow student**
 - sexual assault, violence, exposure to drug/alcohol
- **SUBSTANTIAL INCREASE IN CONCERNS IN LOWER GRADES!!!**
 - Inappropriate touching on and off campus
 - Playdates, bathrooms, after-school programs
- **school promises “safe and secure learning environment”**
 - responsible for behavior of students enrolled
 - duty to admit and enroll safe students
 - student not admitted if properly vetted
- **establish policies and procedures**
 - carefully vet applicants, address misconduct of students, take action if signs of “risk to others”
- **history (on application and in interview)**
 - all education history not just last 2/3 years
 - reasons for departure
 - eligible for return, withdraw/dismissed, agreement reached
 - carefully review dates of attendance
 - day, month and year of attendance, not just school year
 - specifically inquire into disciplinary issues
 - what is “discipline” worthy, does school report to college
 - gap in attendance

transgender and gender fluid students

- lawsuit filed by parents in behalf of student independent school
 - limit access to girls bathroom based on gender discrimination
 - public school cases
- legal claim of negligence
 - acceptance implies creation of safe space
 - fully and safely incorporate into the school community
 - Bullying
- students self identifying as:
 - transgender, gender non-conforming, gender fluid other gender based identities
- identifying at younger ages (kindergarten common)
- Be pro-active -- create “guidelines”
 - consider construction, address sports/restrooms/name use/pronoun
 - Include all constituents
 - board, parents, faculty, students have opinions
- **culture and mission critical to strategy**
- strong feelings impact actions



Parents

- parent responsible for costs & legal fees
 - Payment for costs
 - collecting documents, substitute, legal fees
- **reporting of discipline to college or university**
 - **clearly describe and reference to policy**
 - **Increasing # of challenges**
- age of majority
 - student signs agreement confirming compliance
 - parent signs agreement confirming student's failure to cooperate is grounds for removal
- discretion to determine accommodations
 - Standards of school vs testing entities
- international students
 - instructions to obtain assistance if difficulty with English
 - written in foreign language
 - cover costs if student returned to home country
 - loss of SEVIS grounds for removal
 - no guarantee to college admissions
- removal of student for parent/other adult behavior

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.

- knowledge creates liability if failure to act
 - child injured by parent on offender registry
 - school had knowledge and failed to act
- wide range of responses
- establish acceptable and non-acceptable behavior
 - sex offender registry vs. conviction for violent behavior
- possible strategies
 - take no action
 - prevent enrollment or remove if offense occurs after enrollment
 - 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 with students on or off campus or during or outside of school events
 - notify entire community (class or entire school)

- Hotchkiss case
 - \$40 million decision against school
- consider risk of trip
 - age of students, educational benefit
- current state of international and local trips
- draft guidelines for designing a trip
 - from start to finish
 - make sure every trip follows the guidelines
 - communicating expectations clearly
 - does discipline apply during the trip
 - identify points of risk
 - sleeping arrangements, camping arrangements, home stays, times students unsupervised, drinking, chaperone student ratio, vetting of school “partners”
- permission forms and related documents
 - extensive release of liability provision
 - links to resources and instruction to check and make informed decision (CDC, State Department)
 - medical form confirming fitness for trip
 - chaperone release
 - removal from trip and consequences of travel home

Venable Independent School Law Practice
wise in the school world

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Enjoy the Road Ahead

*Wise In The
School World*

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