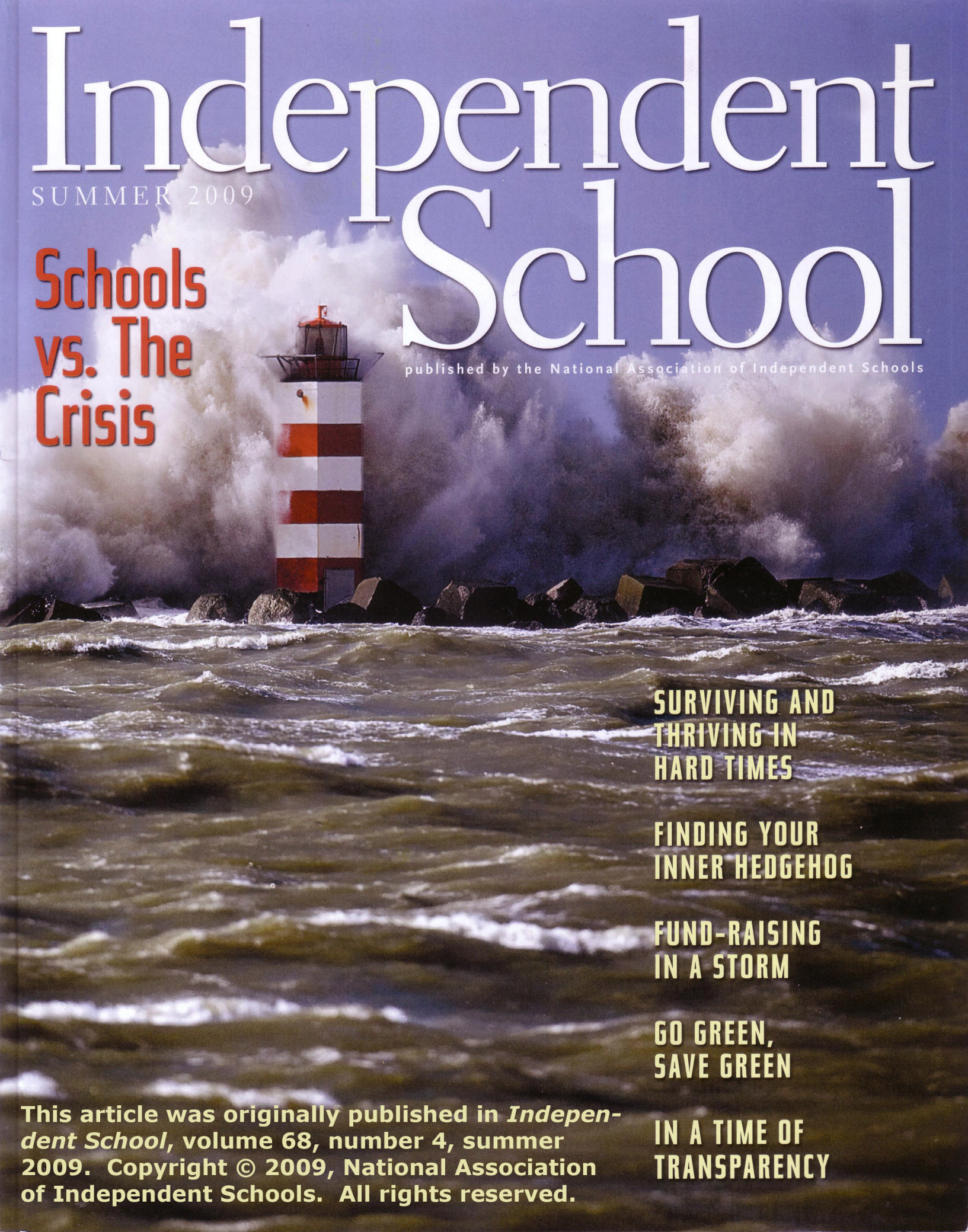


Independent School



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Schools vs. The Crisis

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**SURVIVING AND
THRIVING IN
HARD TIMES**

**FINDING YOUR
INNER HEDGEHOG**

**FUND-RAISING
IN A STORM**

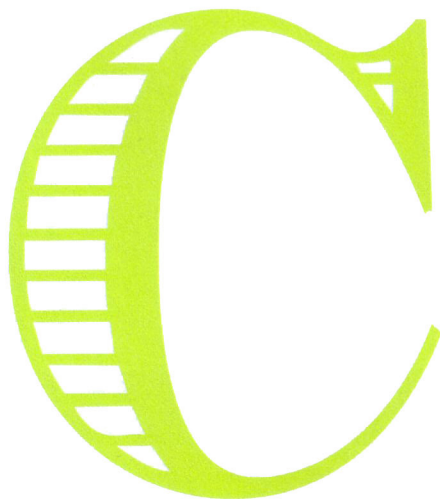
**GO GREEN,
SAVE GREEN**

**IN A TIME OF
TRANSPARENCY**

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RIGHT SIZING YOUR SCHOOL

[A LEGAL PERSPECTIVE]



BY CARYN PASS

Challenging financial times necessitate creative yet considered planning. Indeed, this past spring, independent school boards everywhere were busy reviewing and revising multiple budget scenarios designed to allow for, on the one hand, continued growth and development while, on the other hand, ensuring the sound fiscal health of the institutions. We have entered an era when business as usual is no longer acceptable.

Yet, while these are anxious times for independent schools, it's important to remember that they also offer an opportunity to create stronger, more efficient and effective schools. As Albert Einstein observed, "In the middle of difficulty lies opportunity." In particular, difficult finances encourage critical review of school programs and staffing, with schools increasingly contemplating ways to streamline their programs and rightsize the staff — administrators, teachers, and hourly employees.

Of course, decisions of this nature, while critical to the sustainability of the school, expose institutions to the possibility of legal challenge, based on actions negatively impacting employees. While schools can never eliminate the possibility of such suits, there is much they can do to minimize the risk.

RISK ASSESSMENT AND PROACTIVE PLANNING

When reviewing decisions with possible legal significance, schools must first make risk assessments. In other words, they must consider the benefits against the potential risks associated with a decision. Terminating, say, a long-time, but highly ineffective kindergarten teacher may result in a possible charge of age discrimination. However, if the decision is defended by a poor performance review and multiple requests from parents not to have their child in this teacher's classroom, perhaps the benefit of saving the salary of the extra aid to support this teacher, avoiding the fight with parents each year, and obtaining a talented replacement teacher is worth the risk of the lawsuit.

When considering risk assessment, it is often overlooked that culture plays a critical role in the ability to defend against legal claims. A school's culture is a vital component in all decisions, but should be especially considered when making changes to the employee ranks. Compliance with culture does not mean that a school that has never terminated an employee in the past is now prevented from doing so. Compliance with culture is appropriate when determining the process used to make decisions, as well as how the school communicates with employees, students, parents, donors, and others in the community. If school constituents believe the decision was made fairly (meaning consistent with the culture of the school) they are less likely to be angry and consider other avenues of reprisal, such as public opposition or filing a lawsuit. This does not mean that a school without a history of transparency must open its soul to the community; it only suggests that, if community members are comfortable with the process, they may not agree with a particular decision or be happy that the school needed to make it, but they will be less likely to respond with the threat of a lawsuit or oppose the decision.

No one would disagree that the defense of legal challenges wastes countless hours of time and an abundance of financial resources that would

far better serve the education of students. Proactive preparation taken prior to the decision to institute change will help create a comprehensive defense thereby limiting the time and resources in the event of a legal action. More importantly, careful advanced preparation creates a disincentive for the allegedly aggrieved parties from ever considering entering into such a process.

In preparation for rightsizing your school, therefore, it is best to first review school documents relevant to the employment relationship. Documents considered are those that create a relationship between the employee and the school individually — those that establish the rules that apply to all employees, set procedures and policies followed by the school, and describe

school so decisions in the best interests of the school can be implemented.

Many schools include "employment at will" language in their employment agreement. Schools often mistakenly believe that such language safeguards them from a lawsuit and "allows them to terminate an employee for any reason or no reason." The theory of "employment at will" is that a school is not obligated to provide a reason for the termination. However, a terminated employee is still able to respond to the termination with a claim of discrimination, wrongful termination, or breach of contract.

When drafting employment agreements, it is judicious to establish a time frame for the employment period, a clear notice that there is not a promise

IN PREPARATION FOR RIGHTSIZING YOUR SCHOOL, THEREFORE, IT IS BEST TO FIRST REVIEW SCHOOL DOCUMENTS RELEVANT TO THE EMPLOYMENT RELATIONSHIP.

and outline benefits and other obligations of the school to the employees.

THE EMPLOYMENT AGREEMENT AND OTHER DOCUMENTS

The employment agreement, offer letter, or other documents drafted as the description of the relationship between the employee and employer are of great significance in the procedure to terminate. For this reason, it is prudent to carefully review the agreements prior to dissemination, but, most certainly, prior to terminating any employee's job. Since many schools will consider downsizing staff in the coming year, it is wise to ensure that these agreements provide maximum flexibility to the

of continued employment following this term, and a clear method for changing the relationship prior to the end of the term. To provide maximum flexibility, the contract should allow for termination or modification of the job prior to the end of the agreement, and the school should retain sole discretion over the decision to change the relationship.

Likewise, the reasons given for such a decision should be broad and within the sole discretion of the school. In addition to performance, reasons could include change in curriculum, organization of the school, staffing needs, or financial considerations. Many schools have included "enrollment" as a reason for dismissing staff

members. While this is a possible factor, it is wise to avoid limiting the reasons to this factor. Enrollment is a subjective decision made at the sole discretion of the school. Exposing the decision to scrutiny by the employee or a court is less than opportune.

It is also helpful to articulate the types of changes that can occur. For example, the school should reserve the right to "terminate the employment relationship or modify the job, hours of work, or schedule of the employee." In addition, the agreement should confirm that, upon termination, all salary and benefits will end upon the last date of employment. Upon modification, benefits will be provided consistent with those to which the employee qualifies.

THE EMPLOYEE HANDBOOK

The other relevant documents in need of evaluation are the employee handbook and other policies and procedures. Schools should review documents that establish rules in order to make certain that the rules reflect

the practice at the institution and that they provide sufficient flexibility to make employment decisions. Like the employment agreement, the handbook should include language allowing for termination or modification in assignment, hours, or schedule. Likewise, the handbook should confirm that, upon termination, all benefits and salary end and, upon modification, the benefits amend consistent with the eligibility of the employee.

When making the ultimate decision to reduce staff, it is best to establish a strategic plan of action prior to discussing the issue with employees. Remember, employees may raise claims for discrimination, breach of contract, or other possible misrepresentation claims. To better avoid and defend against any such claim, schools must establish nondiscriminatory strategies that are drafted in consideration of the limitations that may be created by various written documents. Reasons for reductions at this point in time will most often be based on the tighten-

ing economy. However, the selection of employees for job termination may be based on a wide range of issues including performance, reorganization of staff, or changes to curriculum. Certainly enrollment may impact the need for these changes, but it is most likely not the only basis. Therefore, when describing the bases, it is helpful to consider and explain all of the reasons such change is being implemented. This provides the school with a wider range of defense in the case of a challenge to one or another of the explanations.

When determining which employees to select for purposes of reduction, there are some general cautionary comments. If terminating a teacher or staff member based on cost savings, and the school bases the selection on the highest compensated employees, it's important to determine if your choices have an adverse impact on employees 40 years old or older. The older, more experienced members of the work force are generally those who are more highly compensated as a result of longevity at school. Review the complete group of employees selected to determine if there is an adverse impact on employees in protected categories. If the decisions are based on performance, make certain to review the written and oral communications with the employee to determine whether support exists to justify the termination.

By their nature, independent school communities are caring and supportive communities. Letting employees go is never easy, and it's particularly hard in an educational environment. But schools can take solace in knowing that downsizing the staff can also be a matter of rightsizing the school — which is to say, adjusting the school to the realities of the economy and sharpening the focus on the school's mission. It is, in other words, an opportunity to make the school stronger for the future.

Caryn Pass is an attorney at law with Venable, LLP. She specializes in the representation of independent schools.

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Five Cambridge Center
Cambridge, MA 02142
tel 617.547.2200
www.arcusa.com

