

# VENABLE<sup>®</sup><sub>LLP</sub>

## top legal issues for independent schools

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# Top Legal Issues

## overview

- Legal issues based on working with schools nationwide
- Many issues arise from
  - Economic times
  - New legislation and increased government enforcement
  - New technology without policies to govern use
- Preventing and resolving legal issues
  - Establish policies and standards up front
  - Be proactive in calling legal counsel
  - Be consistent with culture
  - Don't panic

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# Parents

## divorce and enrollment contract

- Divorce and personal turmoil
  - Requests for documents and information
    - Who has access to what?
    - Check court orders, subpoenas
    - Check state laws
- Enrollment contract
  - Include language regarding school's right to collect legal fees and other costs incurred when dealing with legal battles between parents
  - Make sure tuition obligation is clear and enforceable
    - Who signs the enrollment contract?



# Parents

## other challenges

- Demanding “more” for their money
  - Re-evaluating costs
  - Challenging programs and decisions
  - Requesting special services (e.g., school counselor)
- Parent bad behavior
  - Parent appearing altered or inebriated
  - Parent/family member crossing appropriate boundaries
  - School’s ability or obligation to limit access to students/school
  - Enrollment contract language should give school ability to remove a student due to bad behavior of parent or other adult associated with the student

## Social Networking

### student acceptable use policy

- Student acceptable use
  - How broad is the policy
    - On campus only or 24/7?
    - School-issued equipment only or personal computer?
    - Response to sexting, allegations of bullying, etc.
      - Investigation
      - Establish expectation of privacy
      - Discipline
  - No harassment, bullying, other activity that violates policy and mission of the school
  - Ensure consistent with other policies (e.g., student discipline policy)

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## Social Networking

### employee acceptable use

- Employee acceptable use
  - No harassment, bullying, or other activity that brings discredit to the school
  - Confidentiality of school and student information
  - Protecting school's reputation and brand
    - No official authority to speak on behalf of the school
    - No use of the school intellectual property, logos, trademarks, and copyrights in any manner
  - Avoid giving a professional reference through social media
  - Establish expectation of privacy
- NLRB case
  - All employees have § 7 rights to concerted activity
  - Impact of recent NLRB suit against employer for firing an employee over Facebook post

# Social Networking

## appropriate boundaries

- Maintaining appropriate boundaries
  - “Friending” students
    - Blurs the lines
      - texting, personal cell phones, personal email, online games
    - Opens teachers to allegations of abuse
    - Implied obligation to report/monitor Facebook or other activity online
  - “Friending” parents
    - Favoritism
    - What if parent is “friends” with student to monitor account
    - Parent has access to personal information (photos) of teacher
    - Parents talk

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# Employment Agreements

## form and structure

- Who receives
  - faculty, staff, administrators, coaches, tutors
- What form
  - letter v. agreement
- Nature of employment
  - employment-at-will v. fixed term
- Definition of “term”
  - 12 months v. 10 months
  - July 1 to June 30 or “academic Year”
  - Consider:
    - Unemployment benefit claims
    - Continuation of insurance
    - Timing of payments

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## Employment Agreements

### helpful clauses

- With uncertainty in budget and enrollment, preserve flexibility for the school
  - No expectation of contract in next year
  - Ability to change employment status
    - termination, modification, reduction in hours
  - Basis for employment change
    - change in curriculum; student enrollment; financial status of school; reorganization
  - Force majeure clause
  - No continuation of salary or pay upon termination
- Privacy of information and student images
- Trademark/copyright
- Conflicts of interest and outside employment (including tutoring, babysitting, house-sitting for families)



# Independent Contractor v. Employee

## overview

- Increased scrutiny by IRS and DOL
  - Employee reclassification initiative for independent contractors - *\$25 million dollars* to strengthen and coordinate federal and state efforts to enforce statutory prohibitions, and to identify and deter misclassification of employees as independent contractors
  - IRS announced it will randomly audit 6000 companies over the next 3 years to find misclassified employees
- Common challenges for schools
  - Tutors, testers, tennis/music instructor, coaches
- Implications of misclassification
  - Unpaid employer taxes
  - Employee benefits (including health and retirement)

# Independent Contractor v. Employee

## redesigned IRS test

- IRS looks at degree of control and independence based on three categories:
  - Behavioral: Does the school control or have the right to control what the worker does and how the worker does his or her job?
    - How is IC evaluated?
  - Financial: Are business aspects of IC's job controlled by the school?
    - How is IC paid, what expenses are reimbursed, who provides tools/supplies, who provides insurance?
    - Opportunity for profit and loss
  - Type of relationship: Are there written contracts or employee type benefits?
    - Pension plan, insurance, vacation pay, etc.?
    - Will the relationship continue and is the work performed a key aspect of the business?
    - Can worker perform this work for other schools?
- Weigh all factors – no magic “number” of factors
- Documents: agreement, job description, other documentation of factors used in coming up with the determination

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## Student Discipline

### establishing a clear policy

- Increased challenges to decisions due to common application
- Establish a clear policy and be consistent
  - What is the code of conduct?
  - Who investigates and determines discipline for violations of code of conduct?
    - Student board involvement?
    - Documentation
  - How does the school respond to sexting, bullying, and harassment?
    - Is the policy only applicable at school or is the school "24/7"?



## E-commerce and electronic contracts

### overview

- Benefits
  - Tracking
  - Convenience
  - Sustainability
- Legal compliance
  - State, federal, and common law
- Vender
  - Take care to confirm representations
- Objective
  - Enforceability



## E-contracting details

### Elements to consider

- Elements
  - Identity confirmation
    - Process for access to system
  - Consent to electronic contract
    - Confirmation of agreement to use e-contract
  - Ability to review and modify
    - Can party review submission of information and modify information
  - Confirmation of school's receipt and acceptance
    - Return email confirming receipt and acceptance of contract
  - School's inability to modify agreement
    - Confirmation that school can't modify agreement
  - Maintenance of document in school's system
    - How is information maintained by school



## Enrollment Contracts

### Key considerations

- Clearly define
  - Student's name, grade, cost of tuition and fees
- Maximum flexibility to remove student
  - Behavior or performance of student
    - Reference student handbook
  - Behavior of parent/guardian or other adult
- Leverage to enforce collection of tuition
  - Holding transcript or contract for following year
  - Prevent attendance at school, after school activities, graduation
  - Unable to take finals, AP exams or other tests

# Articles of Incorporation, Charters, By-laws and Good Governance

## overview

- Review on a regular basis is essential
  - Failure to review may result in non-compliance
- Often ignored for years until governance issue arises
  - Review for legal compliance and school best practices
- Hope for the best but plan for the worse
  - Create proactive procedures to address possible problems
    - ie: removal of trustee

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# Charter and Articles of Incorporation

## overview

- Review regularly
  - Check state filing
    - Document filed consistent with board modifications or amendments
    - In active status
      - Failure to submit tax filings invalidate document
- Charter or Articles in forfeiture
  - Actions of Board invalid
  - School name can be taken
  - Loans and or financing in jeopardy

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## By-laws

### overview

- Review regularly to ensure compliance
  - Board's actions inconsistent by by-laws may prove invalid
    - Proxy vote not provided for in by-laws
    - E-mail notification of board meetings
- Establish policies consistent with good governance
  - Confidentiality provisions
  - Selection of Board members and voting
    - Slate vs. individual nominees
  - Term limits
  - Removal of trustees
  - Executive Sessions



## Governance Documents

### Overview

- Conflict of interest policy
  - Signed by trustees and head annually
  - Process for disclosing conflicts
  - Process for vetting conflict
- Whistle Blower policy
  - Ensures protection of employees who report financial impropriety from retaliation
- Document retention and destruction
  - Policy outlining how documents are maintained and destroyed
  - Important for litigation
    - Once litigation filed documents must be kept



## Good Governance

### overview

- Creation of liability for board or individual trustee
  - Fiduciary duty
    - Review of head's salary
    - Financial responsibility in decision making
      - Alternate budgets
  - Confidentiality
    - Failure to maintain confidentiality of board deliberations
  - Acting outside of scope of duty
    - Failing to support decision of board
- Board Training
  - Method of reducing liability



## Litigation

### Increasing frequency

- Employment
  - Allegations of wrongful termination
  - Discrimination based on protected category
  - Contract breach
  - Handbook non compliance
  - Reduction in staff
- Board Actions
  - Actions outside scope of duty
  - Breach of fiscal obligations
  - Breach of confidentiality



## Litigation

### Additional challenges

- Student issues
  - Discipline
    - Common college applications
  - Enrollment
    - Failure to admit
  - Failure to educate
  - Failure to protect
- Tuition collection
  - Parent's failure to pay tuition
  - Termination of agreement after deadline



## Alternative Revenue Sources

### Overview

- Trademark and copyright
  - Protect new programs
  - Name of school and logo
- Rental of space
  - Insurance
  - Rental Agreements
- Summer camp
  - Due diligence in hiring employees
    - Background checks; employment agreements
  - Permission slips and liability waivers
    - Risky activities
      - Horse back riding; climbing; foreign travel



## Fiduciary Duty and Due Diligence

### Financial obligations

- Legal exposure for misappropriations of funds
  - Insurance may not cover if gross misconduct
  - Fiduciary duty of business office
- Conflict of Interest Procedure
  - Bidding and selecting vendors
  - Considering disclosed conflicts
  - Documenting compliance with process
  - Confirming in board minutes
- Head of School Salary review
- Payment Practices
  - Review of exempt status and calculation of overtime
  - Tracking payroll against contracts





## Fiduciary Duty and Due Diligence

### Financial obligations

- Authority to bind School
  - Policy authorizing binding of school
  - Who can sign and amount limits for multiple signatures
  - What goes before board/finance committee
- Audit and 990 completion
  - Create policy that states
    - Who prepares and reviews
      - Lawyer/accountant
    - Who signs audit and 990
  - How is 990 presented to board
  - How is audit presented to board

## contact information

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