Hot Legal Issues Facing Independent Schools

NYSAIS GOVERNANCE CONFERENCE 2018
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overview

- **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”
governance issues and trustee behavior

- confidentiality issues
  - communication in board meetings

- overstepping by trustees
  - engaging in operations
  - acting during change in leadership
    - pending departure of head, long standing head departs
    - new inexperienced head

- “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.
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 employee 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
- Eliminating AP classes
- 8 schools drafted a letter confirming agreement & sent to Washington Post
alumni allegations of sexual abuse

- **all types of schools**
  - not just boarding

- **alumni claiming abuse by faculty, staff, students**

- **reports made by email, letter, calls, social media**
  - Facebook, survivors websites, blogs

- **strategy for responding to allegations**
  - previously little was done
  - current trend
    - investigation after notification to community

- **keep up to date**
  - read “Great is the truth”
  - boston globe articles
    - spotlight investigation
    - survey sent to schools/threats if failure to respond
  - NAIS/TABS draft document
proactive preparation steps

- **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
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)
vetting applicants for employment

- obligation to expose students to safe adults
- NYSAIS best practice in hiring
- 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
  - any concerns or allegations of inappropriate contact with students
- social media check
  - consider checking Facebook and other social media sites
  - reflects judgment and behavior of applicant
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
student trips

- 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
protecting current students

- mandatory reporting
  - to child protective services and or police
  - compliance with state law
  - internal reporting of issues

- 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
家长应负责相关费用及法律费用
- 支付相关费用
  - 收集文件，替换，法律费用

报告学院或大学的纪律
- 明确描述并参考政策

法律年龄
- 学生签署协议确认遵守
- 家长签署协议确认学生未合作是被开除的依据

酌情决定提供住宿

国际学生
- 指导在英语困难时获得帮助
- 外语文本
- 若学生返回本国，覆盖成本
- 失去SEVIS参与原因
- 无保证大学入学

学生因家长/其他成人的行为而被开除

入校协议

明智于学校世界
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.
student injured by fellow student
  – sexual assault, violence, exposure to drug/alcohol

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
  – student removed if “risk to others”

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 considered “discipline” worthy
    • does school report to college
  – gap in attendance
Wise In The School World

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