

THE NEW SCHOOL YEAR: THREE CHALLENGES SCHOOLS WILL FACE

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The business of running a school is much more difficult today than it was ten years ago. Independent schools have been forced to recognize that they are part of the corporate world with all of the resulting legal liability. Parents and employees are quick to make demands to enforce their actual or perceived legal rights and the media loves the negative attention. So, while it is still early in the school year, this is the ideal time to understand the challenges so that you can assess the areas where your school, its board or administration, may be weak and take steps now to begin to shore up the school's position and defenses.

Outlined below are three of the most pressing challenges that schools faced over the last few years, and will continue to face unless they take positive steps to eliminate the challenge.

STUDENT/ADULT BOUNDARY CONCERNS

Independent schools encourage close student/adult relationships because it builds a better community, enhances communication, results in better family retention, and increases student performance. At the same time, the closeness of these relationships often creates an environment in which inappropriate actions occur. Sometimes the actions are the result of confusion, mixed signals, or immaturity. Other times, the actions occur because persons who prey on children find opportunities within an environment that does not monitor relationships closely enough.

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Regardless of whether the inappropriate or “too close” interactions are innocent or illicit, the school has the obligation to ensure that all interactions on campus, at school-related events, or that are otherwise sanctioned or encouraged by the school, are appropriate. Many schools are finding out the hard way that not having good training, guidelines, and policing have resulted in various claims, ranging from negligence, negligent supervision, negligent retention, and breach of fiduciary duty, among others.

Schools should train the entire community each year on appropriate interactions. The school sets the standards. The school outlines the boundaries. The school must empower every individual within the community to watch for and report inappropriate interactions. It is not typically enough to simply tell everyone what the problems are. You need to have meaningful training in which you use real life examples of problems that have arisen in communities just like your community. It is only then that both adults and students will gain an understanding of the tiny actions that add up over time and result in an inappropriate interaction.

In addition to training, the school should ensure that it has comprehensive policies in both its student handbook and employee handbook outlining appropriate boundaries. For example, the school should discuss the guidelines for communications by students and adults on social media; off-campus interactions such as babysitting, car riding, sleepovers, and pizza parties; communications between adults and students via email, text, or cell phone; personal conversations about non-academic matters; teacher relationships with parents; expectations regarding athletic, tutoring, or other small group or single adult/student interactions; and other day-to-day interactions that have over time been allowed to develop without clear school guidelines.

WAGE-HOUR LIABILITY

Many schools (as well as other types of employers) continue to have to respond to claims under the Wage Hour Law (Fair Labor Standards Act) that they have either misclassified employees as exempt from overtime or have not paid non-exempt employees for all hours worked. This is an area in which strict compliance with the law is required and violations resulting in small amounts of liability can still result in large attorneys’ fees.

This topic could take hours to cover adequately. In short, although there are many exemptions that school employees may qualify for that will make them free from overtime, timekeeping, and minimum wage requirements, there are typically a number of employees within the school's community that do not fall within any exemption. This means that if the employee is not properly classified as exempt from minimum wage, timekeeping, and overtime obligations, the employee must maintain an accurate daily and weekly record of all hours worked; must be paid minimum wage for all hours worked; and must be paid overtime for all hours worked over 40 in a workweek. These obligations sound easy but are extremely difficult to comply with.

For example, many schools continue to believe that if they pay employees a "salary," this means that the employee is exempt from the timekeeping, minimum wage, and overtime obligations of the Wage Hour Law. This is simply untrue. The determination of whether an employee is exempt is driven by the employee's primary duties and responsibilities. Pay may be a factor, but the important point to remember is that paying an employee on a salary basis does not convert the employee to an exempt status.

In addition, it is very common in schools to have a number of people performing more than one function. This makes it not only difficult to assess what the employee's "primary" duty is for the determination of whether the employee qualifies for one of the exemptions, but also means that if the employee is non-exempt, the school may not be paying the individual properly. For example, many schools have security, maintenance, teaching assistants, and administrative personnel coaching sports, driving school buses for night and weekend events, and providing security details at special events. Often, these employees will be paid extra money for these extra duties.

The classic example is the security officer who coaches a sport. The security officer works 40 hours during the workweek (for a weekly salary of \$800) and then coaches football for 10 hours or more during the same workweek (for a 10 week stipend of \$2,000). The school must ensure that the security officer maintains a time record of *all* hours worked in both jobs and if the security officer ends up working more than 40 hours during the workweek (for both jobs combined), then the security officer must receive not only the additional stipend money for the coaching, but

overtime based on the weighted (blended) average of the combined pay. The calculation can be complicated.

The other challenge that some schools have faced is not counting all hours worked for non-exempt employees. For example, some schools use a timekeeping system that automatically deducts 30 minutes from an employee's time for lunch. If your school does this, you should immediately consult counsel to determine whether this practice should continue. This has been a huge area of overtime vulnerability.

Another, more typical, scenario is that employees "clock out" for lunch, but sit at their desks and answer the phone, greet parents, or check emails during lunch. Or, an employee comes to school early, helps with the drop off line, assists parents in the morning, or generally begins getting the school ready to operate. Another employee may take a few small projects home to get caught up before the next school day begins. Although the school appreciates these employees' extra effort, these activities count as "hours worked," even if the school did not know about it or permit it. The hours worked must be included in the total hours for the workweek to determine whether the employee worked more than 40 hours.

If you have not worked with your school employment counsel to assess the exempt status of every employee, review your timekeeping system, and review your pay practices, take the time this school year to do so. You can then work to implement appropriate changes and correct any past practices before you end up with a lawsuit alleging that you owe "Jane Doe and all similarly situated employees" overtime.

STUDENT BULLYING/HARASSMENT

Bullying has been a part of the school experience for as long as any of us can remember. That never made it right or comfortable. Moreover, a student's kick, hit, name-calling, or lunch theft today can and often does result in at least an angry parent episode and, more often, an attorney letter or lawsuit. Many school administrators and employees continue to believe that they are powerless to address negative behavior or that such behavior is not a part of their community. Neither thought is typically correct.

If a student is bullied or harassed based on a protected category such as disability, race, national origin, or color, the parents can assert a civil rights act complaint under either Section 1981 of the Civil Rights Act of 1866 or under the Americans with Disabilities Act. Even traditional bullying of simply mean and targeted taunting, teasing, kicking, etc. can result in various types of claims under new state and municipal laws or under the common laws of most states for breach of contract, intentional or negligent infliction of emotional distress, negligence, negligent supervision, breach of fiduciary duty, and other creative claims.

Although it is true that a school will probably not be able to completely eliminate bullying, if it makes a concerted effort to try, serious incidents will stop and eventually students will learn that it is acceptable to both say no and to report bothersome behavior. This is exactly what happened with sexual harassment issues in employment. Sexual harassment still occurs, but both employees and society now recognize and generally agree that such behavior is inappropriate for the workplace. Employers are rewarded by the courts for having policies, training, and promptly addressing such behavior. Lawsuits are often dismissed entirely when an employer can show that it took appropriate action to both prevent and address harassing behavior. The same concepts can and should apply to bullying and harassment in schools among students.

Thus, the school should re-examine its policies and implement regular training. The whole community should be involved in battling and reporting bullying. The school should conduct age-appropriate training to make the concepts real to the students. Teachers and administrators need to be more sensitive and aware of student concerns (listening to the comments among students, watching for subtle interactions); the community should monitor suspect areas more closely and consider video cameras in states where such monitoring is legal; parents should be educated on listening for and reporting concerns; any aggressive or sexual touching among students should be addressed promptly; and schools should investigate and address all bullying and harassment matters promptly and thoroughly.

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