



Time For Your School's Annual Checkup

Insights

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Now that school has started, it's time to ensure that your house is in order for the school year. Each year we outline those items in which we see trends developing or find issues with which schools consistently have challenges. It is far better to address these issues preventively rather than waiting for a claim or problem to occur. We see three main issues this year that deserve your attention.

Watch For Inappropriate Behavior By Coaches.

Long before Rutgers University fired Mike Rice for the videotape of his behavior toward student athletes, independent schools began to experience a growing number of parents who expressed dissatisfaction with how coaches talk to and treat student athletes. Many parents (but certainly not all) expressed concern over the language coaches use (often involving swearing), the fact that coaches yell, that coaches get in the students' faces to make a point, and that coaches often swat or swipe students across the head or give them a tug or push.

Many coaches feel that this behavior is perfectly appropriate because of the close, instructive relationship that the coach has with the student. Coaches have expressed that their seemingly-aggressive behavior encourages the students and helps them to focus. They also feel that students should understand how to face adversity and the challenges that await them in their college and work careers.

Some parents agree with the coaches, at least outwardly. The reason they seem to agree (or say they do) varies, but comes down to two primary reasons. One is that the parents had tough-love coaches and they feel that the tough-love approach helped them in their lives. Other parents express that these long-term, successful coaches are respected by colleges and universities. College athletic recruiters look to them for an honest assessment of applicants. In this competitive college market, these parents are seemingly willing to accept the rough language and tough-love coaching in exchange for the possibility of a positive recommendation.

This behavior may have been acceptable in the past. But recent reports, suspensions, terminations, and community discussions reflect a changing tide. Some educational institutions have made it clear that they will not tolerate unkind, rude, inappropriate, aggressive behavior by their coaches. Many coaches have also come to recognize that they can encourage and help a student focus without humiliating the student or being overly aggressive.

There are many reasons why schools have changed their position and no longer tolerate this type of behavior. One is because many schools feel strongly that every adult on campus is required to model appropriate, professional behavior. Another is because of the rising tide of claims and complaints.

Today, parents are more willing to speak up about behavior toward their children that they believe is abusive and inappropriate. They sometimes claim that coaches are bullies and that, because the school will not accept bullying behavior among students, the school should not accept it from coaches. Parents also sometimes claim that the coaching behavior constitutes child abuse or is discriminatory because it is based on a student's race, ethnicity, gender, or disability.

The sad truth is, many schools have faced the situation where a group of parents were so afraid of a coach's retaliatory behavior (against their child), that the parents would report the concern only anonymously, or offsite, or with promises that the parents' or students' names would not be disclosed. This is the type of situation that often leads to negative viewpoints being shared on anonymous social media pages, which can become a public relations nightmare for a school.

This is an issue that every school should consider and decide how best to address. If you have coaches who have a coaching style that may not be appropriate for today's expectations, you should take the time now to address those individuals. You should also conduct periodic training for all coaches, not only on these types of aggressive behaviors, but on two other important topics: child-abuse issues and student/adult boundary issues. Coaches often become close to students and will receive information that may lead to a mandatory report of child abuse. Similarly, because of the close, personal (often one-on-one) relationships, coaches sometimes cross those boundary lines, creating yet another type of liability for the school.

Read Criminal-Background Investigative Reports Carefully

It has become an industry custom, if not a state or accreditation requirement, for independent schools to fingerprint all employees prior to hire and then periodically thereafter. Some states, like Pennsylvania, have very strict requirements and standards that will disqualify applicants and employees. Other states do not address hiring processes for educational institutions. Either way, if your school conducts criminal-background checks, you need to ensure that the school is complying not only with your state law, but with federal obligations set forth by the Equal Employment Opportunity Commission (EEOC) and, if you are using an outside entity for the criminal-background report, the Fair Credit Reporting Act (FCRA).

The EEOC's guidelines outline the process and information that an employer should consider when reviewing an applicant's criminal-background report. The employer is to rely on conviction records only. This is because, according to the EEOC, blacks and minorities are arrested at a higher rate. If your policy and practice is to consider arrest records in employment decisions, such practice may have a disparate impact on blacks and minorities.

When reviewing conviction records, the potential employer is supposed to look at the relationship of the conviction to the job in question, how long ago it occurred, what the individual's age was then and now, how the individual has progressed since that time, the individual facts relating to the conviction, the person's jobs since that date, character references, and other individualized factors that will help the hiring manager understand whether the applicant should be disqualified from employment.

This is where we have seen many schools have difficulty. The fingerprint reports are often difficult to read. They frequently do not provide information on disposition of the charge. When they do, the information may be difficult for the school to understand. The process that we recommend schools follow is to ensure that they 1) receive assistance in interpreting the criminal-background reports, including any additional comments and notes that the federal agency may have inserted into what appears to be standard disclaimer language, and then 2) follow up with the applicant to obtain clear information regarding the underlying facts, including any documents that support what occurred.

Document all of your efforts. If there are any concerns, seek advice from your school attorney before making a final decision.

If the school is leaning toward not hiring the individual, and used a third-party agency to obtain criminal-background information, it must follow the guidelines of the FCRA in providing the applicant with statutorily-required notices before the final decision is made and then a separate notice after the final decision is made. Failure to do so could result in a lawsuit seeking damages, attorneys' fees, costs, and possible punitive damages. In addition, the Federal Trade Commission may choose to bring an administrative action and seek statutory penalties. Compliance with this law is easy, but often neglected. If you need assistance or would like to receive the Fisher Phillips Fair Credit Reporting Act kit, contact the author or your Fisher Phillips lawyer.

Student/Adult Boundaries: The Elephant In The Room

Boundary issues continue to grow and reflect a change in how parents believe school employees should interact with their students. In the typical student/adult boundary scenario, a teacher, coach, or other adult of the school becomes too friendly with the student. They often have personal conversations, nicknames for each other, discuss relationships, text, become friends on social media, and other activities.

That then leads to the possibility of overstepping the professional relationship and creating a personal relationship. In some unfortunate circumstances, the relationship turns sexual, resulting in a whole host of problems. Schools have been very open to the concept of training employees, monitoring interactions, implementing reporting guidelines, and addressing overstepping.

Interestingly, when we conduct training on adult/student boundaries, we find a near universal failure of schools to address the elephant in the room: employees babysitting students, employees having students sleep over with their children, and employees accompanying families on vacations. When we ask the question about what the school's policies are in these areas, most schools

reluctantly admit that they have not addressed the issues. They know that teachers like the extra money that comes from babysitting. They don't want to intrude on personal/parenting activities, and they feel that if a family wants to invite a teacher or employee on vacation – what's the harm?

As lawyers, we can, of course, see a range of concerning issues. In fact, we have seen a number of cases (and are presently defending some) involving these very types of interactions. The ability to engage in boundary-crossing behavior is even greater when adults in your community are alone with students or are involved in relaxed activities that cause both the adult and student to let their guard down. This is especially true if there is any alcohol involved.

Schools will often wonder how they could be liable for behavior of an employee when the employee is engaged in a purely personal transaction (babysitting or accompanying families on vacation) or acting as a parent (permitting a sleepover). The fact is, by employing the adults in your community, and touting the safety and security procedures of the school, including your stringent criminal-background clearance process, you are saying something about every adult on your campus – they are safe to be around children.

Typically, when the school receives a demand letter or lawsuit, the allegations that connect the school to the claim are that the school either made actual or implied representations about the safety of the adults, which the parents relied upon to their detriment and the child's harm; or that the adults engaged in behavior on campus or at school-related events that should have put the school on notice of the employee's propensity to engage in inappropriate behavior and that the school failed to take steps to remove the employee or to warn the parent community about the employee, resulting in the child's harm.

As you consider what the school's policies should be, we suggest that you have a frank conversation with your administrative team about the issues. You should find out how widespread the various activities are. Your school may not have any adults that vacation with families and babysitting may be at an all time low (given competing demands on everyone's time). If so, you may only need to deal with issues like sleepovers. On the other hand, if vacations and babysitting are widespread practices, you should talk about what the school's position should be on these practices and how such activities can create potential liability for the school. Discuss whether the school should permit these types of activities at all or with established guidelines.

The harder issue to discuss will be sleepovers. Many employee parents with children in the school will feel that you are becoming too involved in their personal lives if you prohibit sleepovers, which could create a serious morale problem. We are not suggesting that that is the only alternative. Rather, we are suggesting that you talk with employees about the fact that you are trying to protect them, the students, and the school from possible misunderstandings, claims, and liability. Let them know that the good practices they employ at school should be employed at home when they have a student over as a visitor.

Give them some ideas of what you mean, such as not permitting alcohol in the house when there is a student there for a personal interaction, requiring that two adults be present for any sleepovers

student there for a personal interaction; requiring that two adults be present for any sleepovers; that they ensure that all persons in the home interact properly with students, etc. Ask employees for their suggestions on how the school can continue to permit sleepovers and yet meet the common goals of protecting students, employees, and the school from claims and liability. You will be surprised at some of the very workable, positive suggestions employees have come up with. The main point is to begin the conversation and start people thinking in the right direction, even if you choose not to make any changes for this school year.

For more information, or for assistance or training in any of the areas discussed in this article, contact the author at SBogdan@fisherphillips.com or 954.525.4800.

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