

Hot Legal Issues in Independent Schools

Kathryn Beaumont Murphy, Esq.

Co-Chair K-12 Practice Group

Saul Ewing Arnstein & Lehr LLP

SAUL EWING
ARNSTEIN
& LEHR^{LLP}



© Copyright 2019 Saul Ewing Arnstein & Lehr LLP

Presentation Agenda

Current events

What
happened?

What are we
learning?

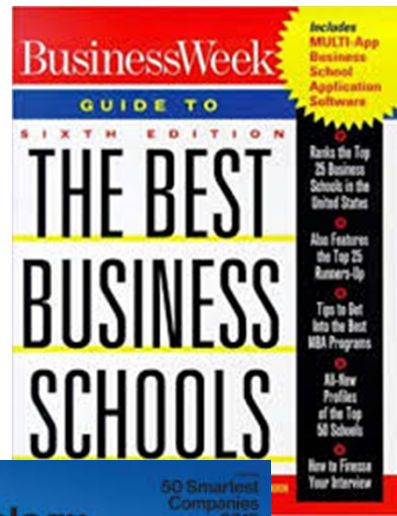
What should
you do?

1. Admissions: Varsity Blues, *Harvard* decision, NACAC-DOJ settlement
2. Statutes of limitations reform and “past” sexual misconduct

Emerging yet evergreen issues

3. Student mental health – removal from campus
4. Esports
5. Cannabis
6. Vaping
7. Vaccines and pandemics
8. Divorce & custody issues
9. Election 2020

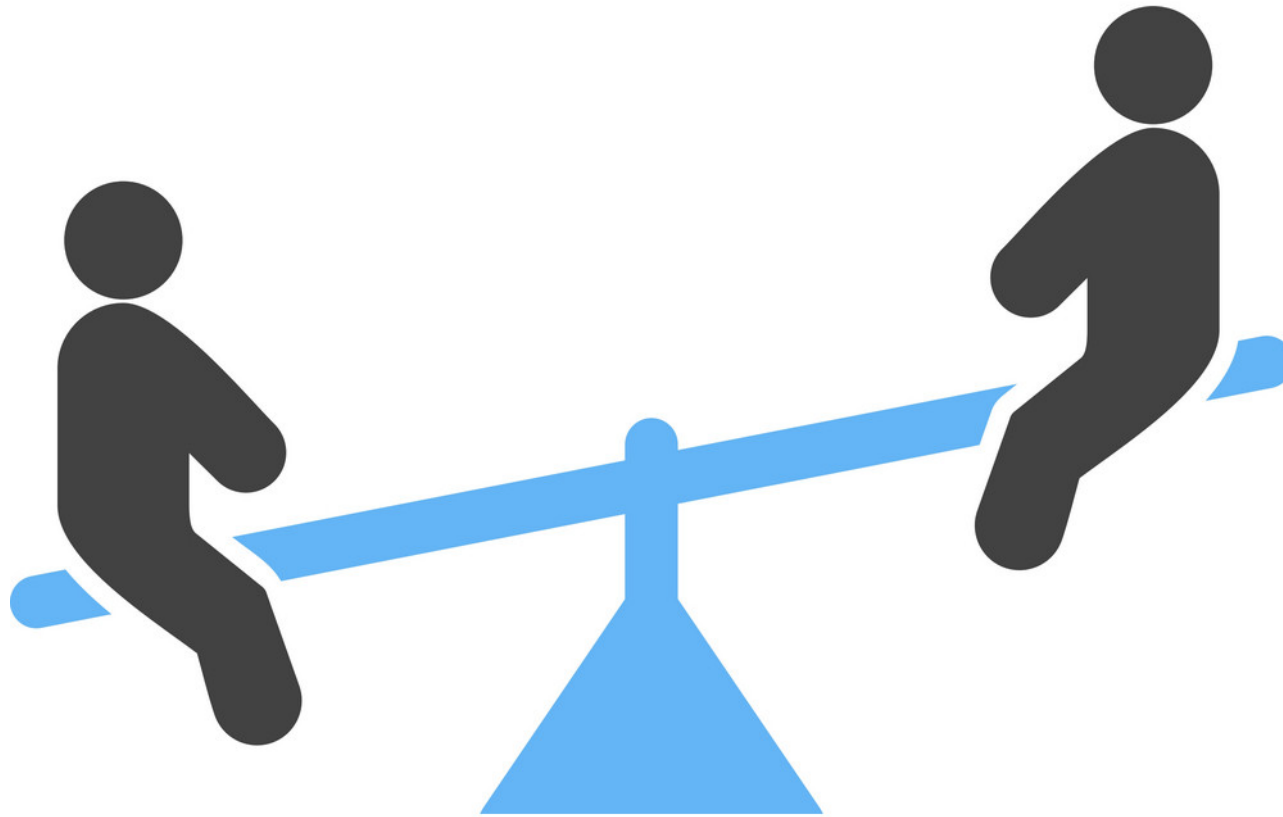
SAUL EWING
ARNSTEIN
& LEHR^{LLP}



VIEWPOINT
SCHOOL



SAUL EWING
ARNSTEIN
& LEHR^{LLP}

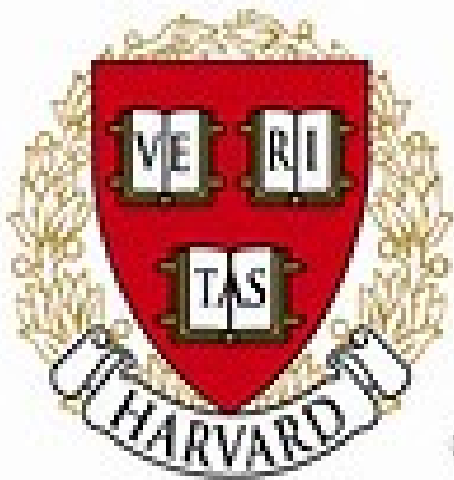


LAW

Children,
let's settle this
like adults.



Admissions



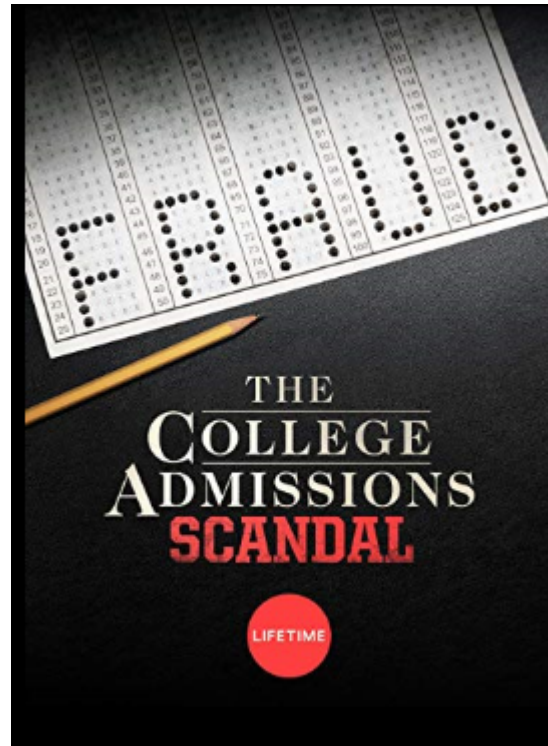
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC., *

Plaintiff, *



Civil Action No. 14-cv-14176-ADB



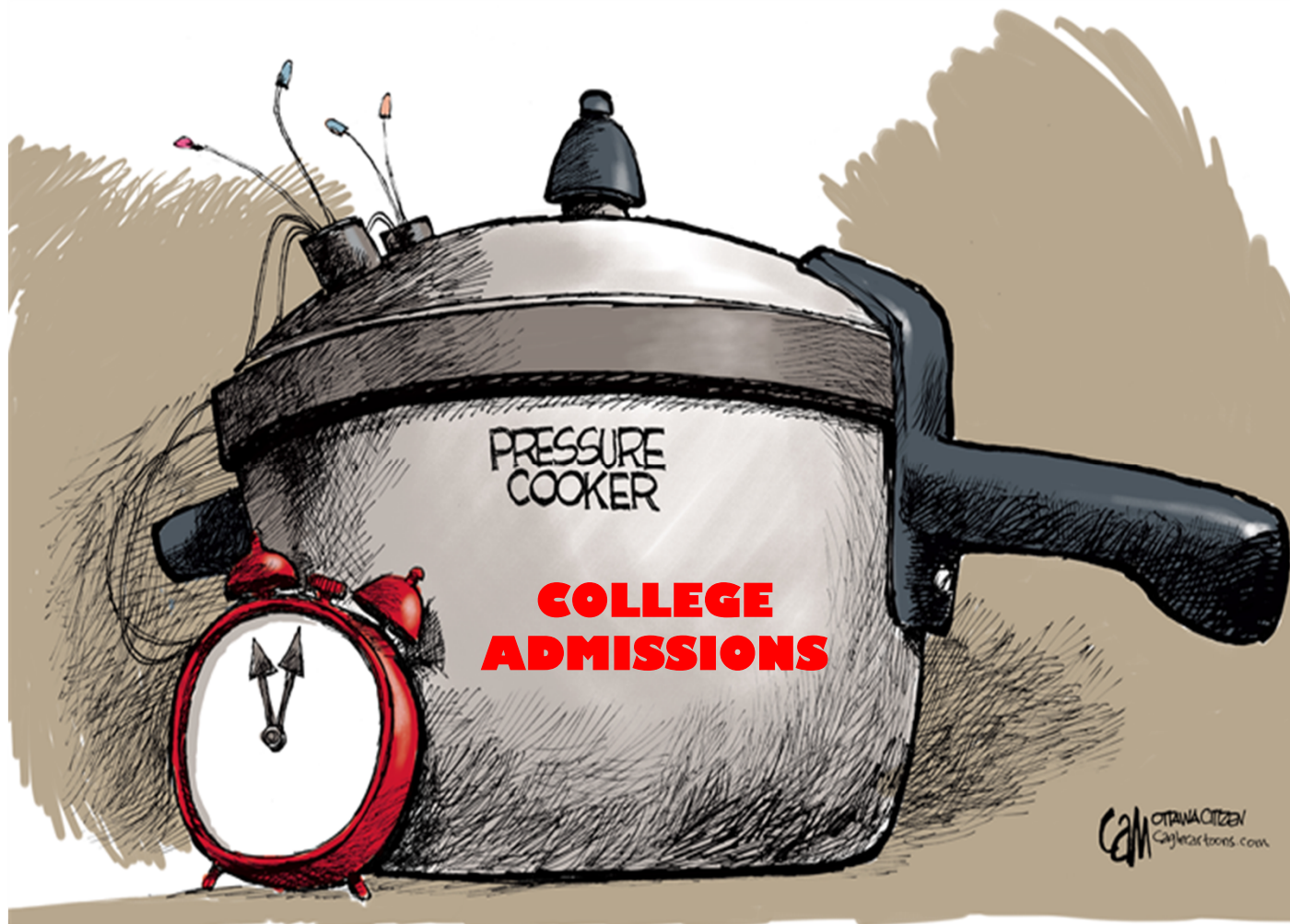
What are we learning?



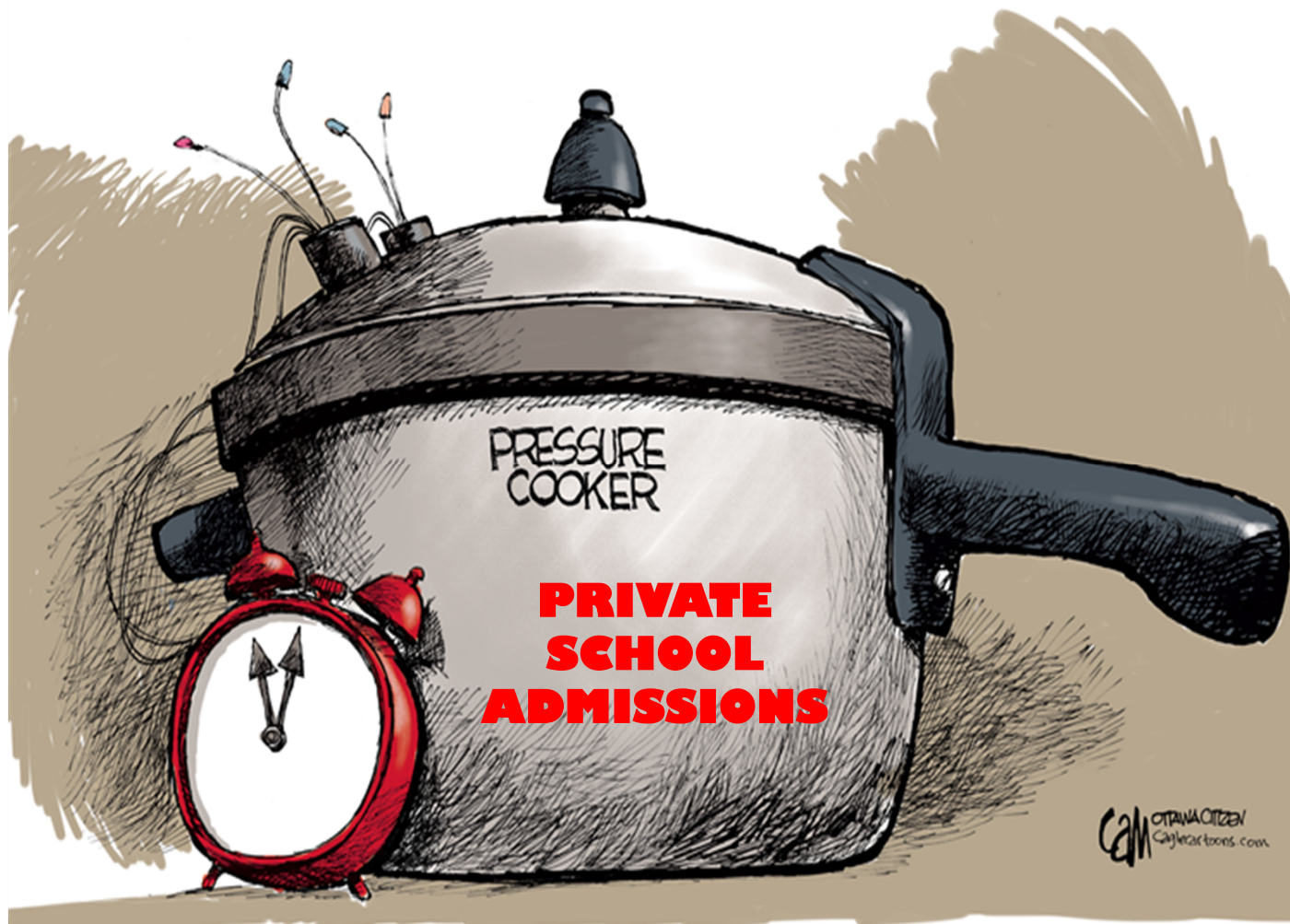
Exploitable loopholes in admissions process: testing, sports



Prevalence and role of “independent” college consultants – do you need to step in?



cam STRANA CITIZEN
Cartoonists.com



What should you do?

Your admissions:

- Gift policy (no quid pro quo!)
- Sports/club sports
- Who sends in grades/test scores to your admissions office? Prior school only.
- Enrollment contract (see example)

Your college counseling office:

- Properly document accommodation requests that come through the school. Shore up test centers.
- Who sends in grades/test scores? Your office only.
- Document conflicts with your college counselors.
- Outside college consultant policy (see example)

**SAUL EWING
ARNSTEIN
& LEHR^{LLP}**

Enrollment Contract

“We rely on the completeness and truthfulness of the information provided by both students and parents in the admissions and enrollment process. If we learn, after the student has enrolled, that the student and/or parent was not truthful or has failed to disclose information in the admission or enrollment process on any issue that we, in our sole discretion, find to be material, we reserve the absolute right to terminate this Enrollment Contract.”

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

Statement on Independent College Counselors



FLINTRIDGE PREPARATORY SCHOOL

Independent Counselor Statement

As the college admission climate continues to grow more complex, it is important for the Prep College Counseling Department to address the continued growth of the independent college counseling industry marketed to assist families through the college admission process. Historically, the business of independent counseling developed from the lack of resources available on public school campuses. With counseling caseloads of 800 students to one counselor, it is understandably a significant challenge for school counselors to effectively and thoughtfully counsel their students. Therefore, in such environments, outside counselors are helpful and necessary. However, this is not the case for Prep as we are a small school which provides our own comprehensive counseling program to all our students. The average student to counselor ratio at Prep is 35:1. The Department offers over 40 years of counseling and education experience, with the full-time counselors having served as former admission officers. The Prep college counseling guidelines have been thoughtfully crafted, intentionally launch

Unfortunately, it is often the case that independent counselors are parents who have gone through the process with a child, former teachers, alumni of highly selective institutions, or professional writers who lack substantive professional college admission experience. Independent counselors often provide unsophisticated and outdated advice while charging a great deal for services families are already receiving at Prep. When parents make the decision to hire an outside counselor, it is important to understand the child is being placed in the middle of two voices who are at competing odds, adding unnecessary angst to an already stressful process. It is obvious when students submit writing or follow approaches generated by an outside counselor, and most importantly it is obvious to college admission officers. *The college counseling department strongly discourages securing outside counseling* and the following statement expands on our position.

Prep Context

Prep's guidance counseling schedule is reviewed annually in understanding Prep's academic year student's application

Counseling and advising is a and dean system. Confining grade; brings about challenge authenticity; a trait which they are genuine, and support when working in a college application. On view the world in a different on the crux of what makes prepped or packaged. The

Guiding students to present their stories in compelling ways is the Prep college counseling difference.

Unfortunately, it is often the case that independent counselors are parents who have gone through the process with a child, former teachers, alumni of highly selective institutions, or professional writers who lack substantive professional college admission experience. Independent counselors often provide unsophisticated and outdated advice while charging a great deal for services families are already receiving at Prep. When parents make the decision to hire an outside counselor, it is important to understand the child is being placed in the middle of two voices who are at competing odds, adding unnecessary angst to an already stressful process. It is obvious when students submit writing or follow approaches generated by an outside counselor, and most importantly it is obvious to college admission officers. *The college counseling department strongly discourages securing outside counseling* and the following statement expands on our position.

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

Students for Fair Admissions, Inc. v. Harvard University

Background:

- Students for Fair Admissions claimed that Harvard's race-conscious admissions policy **(1)** intentionally discriminated against Asian-Americans (Title VI violation), **(2)** engaged in racial balancing (i.e., quotas), **(3)** used race as a predominant factor in admissions decisions, rather than a “plus” factor or one of many factors, **(4)** considered the race of applicants without first exhausting race-neutral alternatives.

The issue:

- Did Harvard meet the constitutional standard of **strict scrutiny** – the highest standard of review the court uses in deciding discrimination complaints – for considering race in admissions, and in meeting this standard, did it nevertheless discriminate against Asian Americans?

Holding:

- Harvard can continue to consider race as **one of many factors** in pursuit of a diverse class because
- It articulated a **compelling interest** in student body diversity, and its policy was **narrowly tailored** to accomplish its purpose.
- “The Court will not dismantle a very fine admissions program that passes constitutional muster, solely because it could do better.”

**SAUL EWING
ARNSTEIN
& LEHR^{LLP}**

A brief history of Supreme Court and race-conscious admissions

- Regents of University of California v. Bakke, (1978)
- Grutter v. Bollinger, (2003)
- Gratz v. Bollinger, (2003)
- Fisher v. University of Texas at Austin, (2016) (*a.k.a.* “Fisher II”)

What did we learn? (In short!)

- As in Fisher II, courts are willing to recognize diversity as a compelling interest, **but...**
- If a race-conscious admissions policy *is challenged*, a court will rigorously scrutinize the institution's conduct in creating and implementing an admissions policy. Therefore, a careful, documented policy is key.
 - Race can be **one of several factors**, so long as
 - you have articulated a **compelling interest** in diversity, and
 - your policy is **narrowly tailored** to achieve that interest.

SAUL EWING
ARNSTEIN
& LEHR^{LLP}



What did we learn?

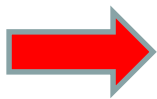


1. Race is one of several factors
- Race taken directly into account only when assigning applicants' **"overall rating"** at the end of the process; it is not a "defining feature."
2. Harvard articulated a compelling interest in racial diversity
3. The policy was narrowly tailored
- In Grutter, the Court said that a race-conscious admission program **cannot use a quota**. "Individualized consideration in the context of a race-conscious admission program is paramount." Harvard's policy considered race as a "plus" factor in the context of individualized consideration.
- In addition, race-conscious admissions policies must not **"unduly harm members of any racial group,"** Grutter. If Harvard considers "personal ratings" as part of its policy, and if Asian American applicants scored lower, is this an undue burden? The court said no, and noted that it is "unable to identify any individual applicant whose admissions decision was affected..." nor was there "evidence of any discriminatory animus or conscious prejudice." There was a holistic review; now Harvard explicitly states, "race or ethnicity should not be considered in assigning the personal rating" and uses **"courage in the face of seemingly insurmountable obstacles," "leadership," "resiliency," "judgement," "spirit and camaraderie with peers."**
- The court stated that some **race-neutral alternatives**, such as admitting only students at the top of their classes, **are unworkable**. Removing admissions preferences for athletes or legacies might "improve socioeconomic diversity" but would have limited impact on racial diversity.

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

What should you do?

- *Harvard* suit brought under Title VI of the Civil Rights Act of 1964 (prohibits discrimination ... in programs and activities receiving federal financial assistance).
- **Other limitations on racial discrimination**
 - Contract law: Section 1981 of the Civil Rights Act of 1866. Runyon v. McCrary, (1976).
 - Tax-exempt status: Bob Jones Univ. v. United States, (1983).
 - State law *may* prohibit consideration of race in school admissions and prohibit asking an applicant about race.



Take the position that you should meet the standards applied by the Supreme Court in Constitutional or Title VI cases (i.e., **strict scrutiny**) as a defense against Section 1981 claim, state law claims, or public attacks.

What should you do?

1. Articulate your **compelling interests** in a diverse student body – what are the educational benefits that “flow” from it at your school? Identify how these benefits relate to your mission. SCOTUS: promoting cross-racial understanding and learning outcomes. Harvard’s committee articulated others.
2. Is your policy **narrowly tailored**? Document prior efforts at/analysis of “available” and “workable” race-neutral alternatives to increase diversity.
3. **Train your admissions staff** that they “should not take an applicant’s race or ethnicity into account in making any of the ratings other than the overall rating,” because race is only “one factor among many”.
4. State that your policy is **subject to periodic review**.

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

NACAC/DOJ: What happened?

NACAC/DOJ Consent Decree

- NACAC updated their Code of Ethics and Professional Practices (CEPP); in 2017, DOJ suspected the updates were potential antitrust violations (“no poaching” agreements).
- December 2019 Consent Decree. NACAC must remove three anticompetitive rules from CEPP (members voted to do so in September) regarding the recruitment of:
 - (1) Transfer students from other schools (DOJ: students shouldn’t have to initiate contact)
 - (2) Prospective incoming freshman after May 1 (DOJ: prevents students from lowering costs through continued offers)
 - (3) Prospective early decision applicants (incentives)

What are Antitrust Violations?

- Antitrust laws exist to ensure that fair competition occurs across industries. In short: you cannot make a decision that affects finances in conjunction with others in your industry.
- You cannot come to an agreement together, whether by express agreement or circumstantial evidence, e.g., “**collusion.**”
- You cannot collude to artificially stifle competition by raising or lowering prices, e.g., “**price fixing.**”



**SAUL EWING
ARNSTEIN
& LEHR^{LLP}**

What are we learning?

- DOJ considers higher education an area ripe for antitrust violations, from no-poach agreements to anti-competitive admissions practices.
- They will take action.
- If they go after higher ed, will they go after independent schools too? **Yes.**

What should you do?

- **Specific to Admissions:**

- No agreements or understandings with coalition/peer schools not to recruit a student already committed to another school

- **Generally:**

- Price restrictions: tuition, financial aid, salaries
- Data sharing
- Employee recruitment
- Formal or informal “agreements” with your peers

What you should **not** do



Opinions

Our schools will get rid of AP courses. Here's why.



A student takes notes in an Advanced Placement class at Woodrow Wilson High School in Washington in 2014. (Charles Dharapak/AP)

By **Eight Heads of Washington-Area Private Schools**

June 18, 2018 at 4:39 p.m. EDT

In an era when the quality and nature of American secondary school education are subjects of vigorous debate, it is time to rethink our curricula. Together, we lead eight

**SAUL EWING
ARNSTEIN
& LEHR^{LLP}**

Statutes of Limitations Reform



Statutes of Limitations Reform/ “Look-back windows”

Childhood abuse survivors who did not file a claim before SOL expired under prior law (e.g., age 20 or within two years or realizing injuries connected to abuse) have an additional period to bring retroactive claims (1, 2 years).

- In 2019, **15** states extended civil SOL; VT eliminated
- In 2019, **nine** states opened a “look-back window” for civil cases (AZ, CA, MT, NJ, NY, NC, RI, VT, DC) + PA amendment
- Already in 2020, **two** states have introduced bills to extend civil SOL, **five** to eliminate them, and **six** to open a “look-back window”

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

What are we learning?

- From a public interest perspective, no longer acceptable not to address legislatively, and maybe judicially.
- Exceptional rate for potential lawsuits; **1,452** suits (as of January 29, 2020) filed in NY since August 2019.
- Are entities in states with no “look-back windows” immune?

What should you do?

- Investigation? Maybe.

“...we (re)considered the situation through the lens of society’s evolving recognition and understanding of both the great harm caused by such abusive relationships and best practices for prevention of and response to such abuse. With the benefit of hindsight, we realize that we could have done more; specifically, we could have taken steps to determine if any other students had been harmed ...”

- Prepare now: crisis management policy, internal team (including board), role of board/reporting to board, insurance policies (from time of allegations), counsel (general / litigation/insurance), crisis PR (engaged by counsel)
- Ongoing school commitment to student safety (revisit current policies)

Student Mental Health

“Students were diagnosed or treated for the following:”

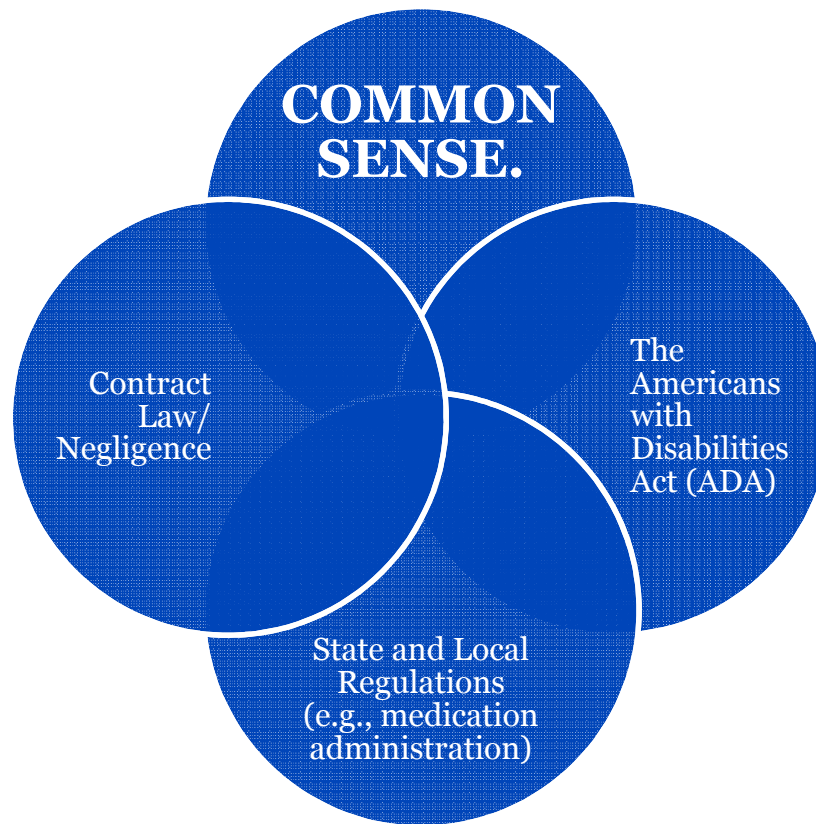


Font size is equivalent to percentage of student response from the 2012 ACHA-NCHA II report.

SAUL EWING
ARNSTEIN
& LEHR^{LLP}



Legal Framework



The Americans with Disabilities Act (ADA)

Title III of the ADA covers students in places of public accommodation, which include **private schools**.

Title III defines **disability** as:

- A physical or **mental impairment** that substantially limits one or more major life activities of such individual;
- A record of such an impairment; or
- Being regarded as having such an impairment .

A **mental impairment** is defined as including “emotional or mental illness” and “specific learning disability” (such as ADD and ADHD).

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

The Americans with Disabilities Act (ADA)

**Mental impairment/illness =
disability.**

**Must
accommodate
*unless:***

- Would **fundamentally alter the nature or purpose** of the school's programming
- Would pose an **undue burden**

OR

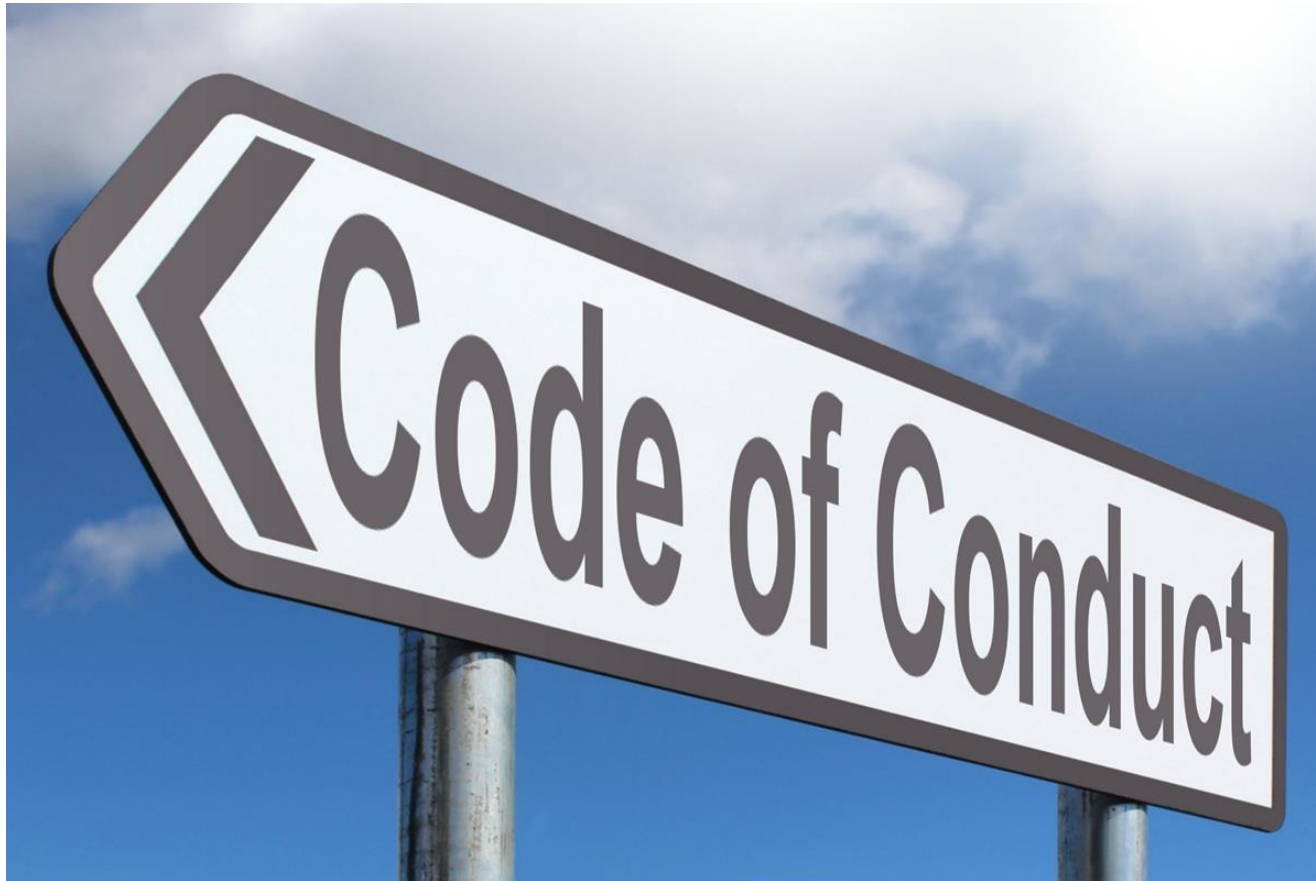
- There is a **direct threat** to others

The Americans with Disabilities Act (ADA)

Fundamental alteration/undue burden:

- **Fact specific inquiry** based on the school, size of the school, the programming in question, etc.
- A school is not required to lower academic minimum requirements but, for example, additional time for testing is not generally considered a burden.

But what about ...



SAUL EWING
ARNSTEIN
& LEHR^{LLP}

- **NO NEED TO ALTER NORMAL DISCIPLINARY SYSTEM.**
- ****Your focus is on *behavior*, not mental health condition.**

Direct Threat

Does the continued presence of the student present a direct threat to the community?

Direct Threat

- Individualized assessment
- Based on reasonable judgment
- Relying on current medical knowledge or best available objective evidence about:
 - Nature, duration, severity of risk
 - Probability that injury will actually occur
 - Whether **reasonable modifications** to policies, practices or procedures could mitigate risk

When removal is the best option

- If involuntary leave is invoked, make sure it's done pursuant to a **generally applicable policy**.
- Provide the student notice and a right to present relevant facts to the decision-maker.
- Consider implementing a right to appeal.
- Involve parents early. Work with the student (and parents) to achieve voluntary removal from the situation if you believe that will help reduce the threat to the student or other members of the community.
- Ensure that the student remains “otherwise qualified” to participate in the community. Have you done everything else you can do without it fundamentally altering or being an undue burden?

Conditions for return:

- Must be individualized.
- Focused on behavior, not underlying condition. Is student qualified to return from a health/safety/capability perspective?
- Cannot require that student be symptom-free.

SAUL EWING
ARNSTEIN
& LEHR LLP



Esports



- What is it?
- A recent worldwide Extreme Networks survey of primary, secondary, and higher education institutions found:
 - **21%** have an esports program; **79%** do not
 - **26%** are considering adding one; **29%** are not; **45%** are undecided
 - Top three games: League of Legends (**82%**); Overwatch (**52%**); Fortnite (**38%**)
 - For broadcasting, schools prefer Twitch (**38%**) YouTube (**18%**); Facebook Live (**12%**); Twitter (**3%**)

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

Esports

- Do you have a formal team?
 - Where do they practice? Using your IT?
 - If not, it's likely happening informally anyway
- What are the issues?
 - Support, but with parameters: e.g., Code of Conduct policies on cyberbullying/ harassment; game content; equal participation for girls; mental/physical health of athletes
 - Contractual: League participation agreement (revenue sharing/cash prizes, intellectual property, privacy) → legal review

Cannabis

Changing Employment Considerations

- “Marihuana” remains illegal under the federal Controlled Substances Act (CSA). But, the CSA does not preempt state analog statutes, so states may pass their own laws permitting medical and adult use cannabis.
- As states continue to add cannabis laws, administrators should be cognizant of new employment protections for cannabis users.
- For example, the Illinois Cannabis Regulation and Tax Act prohibits employers from terminating employees for using cannabis during their time off from work. Only employees who are intoxicated while at work can be terminated or disciplined for their cannabis use.
- But, Illinois employers are still permitted to adopt reasonable zero tolerance or drug free workplace policies concerning drug testing, smoking, consumption, storage, or use of cannabis at work, so long as such policies are applied in a nondiscriminatory manner.

SAUL EWING
ARNSTEIN
& LEHR ^{LLP}

Cannabis

Student Medical Use

- **17 of 33 states with medical cannabis programs permit medical cannabis use for minors.**
- Some states allow students to consume medical cannabis products on school grounds if properly authorized by a health care professional.
- Some states have also determined that, within the scope of their practice, a registered nurse or licensed N.P. may administer U.S. Food and Drug Administration (FDA)-approved cannabidiol (CBD) products such as Epidiolex to students in schools under the direction of a qualified health care practitioner with prescriptive authority. But, frequently, the student or the student's parent must administer other medical cannabis products on school grounds.
- Even still, some states that otherwise allow students to use medical cannabis permit individual schools to prohibit such use if it would cause the school to lose federal grant funding.

SAUL EWING
ARNSTEIN
& LEHR ^{LLP}

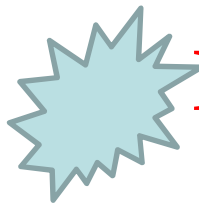
Cannabis

Best Practices

- Monitor changing state cannabis laws for employee protections and modify employee policies when necessary;
- Understand if your state allows minors to consume authorized medical cannabis in school; and
- Develop clear policies surrounding medical cannabis use by students, if permitted, including who may administer the product and where in the school it may be administered.

Vaping

- Legal status (e-cigarettes technically not legal anywhere)
 - State/local restrictions



Public health ~~problem~~ crisis

- Children are *targeted* (JUULs! Hoodies! Watches!)
- Discipline: Should schools treat vaping like nicotine?
 - More serious than nicotine?
 - Realities of marketing/addiction

Vaping: Things to Think About When Rethinking Your Policies

1. Initially, treat vaping as a drug offense; test for presence of drugs.
2. If nicotine, distinguish between cigarettes and vaping:
 - Different discipline
 - Different outcomes for self-reporting

But first!

- Instrumental to take community through medical training.
- Give time to roll out, get help with addiction, get parents involved.

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

Vaccines and Pandemics

- Increase in measles, pertussis
 - In some cases, this has led to states banning religious/philosophical exemptions
- What should you continue to do:
 - Follow state law; notify parents of changes
 - Create written policy that mirrors the law
 - Who oversees documentation?
- Sick children should not attend school (norovirus, hand foot, and mouth)
 - If infectious disease, work with local health officials
 - Draft communications plan.

Divorce and Custody Disputes

Father sued private school for breach of contract when Oaks Academy would not allow father to pick up child or participate in field trips after mother received order for protection against father. Court ruled on SJ motion in favor of academy because enrollment contract did not include these privileges. Ford v. Oaks Acad., 132 N.E.3d 920 (Ind. Ct. App. 2019)

- Access to grades, to disciplinary reports, to events.
- **Your response:**
 - What does your custody agreement say?
 - This is between the parents and the court, not the parents and the school.

SAUL EWING
ARNSTEIN
& LEHR^{LLP}

Enrollment Contract

Reimbursement for Domestic Legal Issues

“...You understand that it is disruptive to the School for a parent to involve the School (or any of its employees) in domestic legal disputes between the parents/guardians and that **the School often must pay for legal fees and costs associated with such issues. Therefore, you agree to promptly reimburse the School for all expenditures incurred by the School as the result of your domestic legal disputes**, including, but not limited to: parental disagreements about the Student’s education or placement; divorce proceedings; custody proceedings; and/or modifications of custody agreements or proceedings. Costs incurred may involve reasonable attorneys’ fees/costs to prepare for and/or attend depositions, trials, or hearings; communication with you or your counsel, guardians ad litem or attorneys ad litem; response to subpoenas; drafting of letters or motions; and performing research. Costs may include the cost of copying documents, providing records, engaging substitute teachers or temporary employees, computerized research, and/or travel expenses. ..”

Rules and Regulations

“To operate effectively, **the School must have a positive relationship** with the Student **and the parents/guardians**. A positive relationship is built on mutual trust, respect, and cooperation... **The School reserves the right to dismiss a Student whose parents/guardians no longer have a cooperative relationship with the School, in the sole judgement of the Head of School.**”

SAUL EWING
ARNSTEIN
& LEHR^{LLP}



Election 2020



- **Employees**

- First Amendment rights extend only to government suppression of free speech, not private actor.
- Does the speech occur within responsibilities of job?
 - Lawful, off-duty conduct varies by state.
 - What are your expectations for employees?
- BUT, be aware of anti-discrimination laws.
Employee's right to work in an environment free from discrimination and harassment.

- **Students**

- Bullying/harassment

- **Look at your policies and educate everyone now,
and again in fall 2020**

**SAUL EWING
ARNSTEIN
& LEHR^{LLP}**

QUESTIONS?

Thank You



Kathryn Beaumont Murphy, Esq.
Counsel, Co-Chair K-12 Schools Practice
Saul Ewing Arnstein & Lehr

(215) 972-1955
Kathryn.Murphy@saul.com

Baltimore

Lockwood Place
500 East Pratt Street, Suite 900
Baltimore, MD 21202-3171
T: 410.332.8600 • F: 410.332.8862

Boston

131 Dartmouth Street
Suite 501
Boston, MA 02116
T: 617.723.3300 • F: 617.723.4151

Chesterbrook

1200 Liberty Ridge Drive
Suite 200
Wayne, PA 19087-5569
T: 610.251.5050 • F: 610.651.5930

Chicago

161 North Clark
Suite 4200
Chicago, IL 60601
T: 312.876.7100 • F: 312.876.0288

Fort Lauderdale

200 E. Las Olas Blvd.
Suite 1000
Fort Lauderdale, FL 33301
T: 954.713.7600 • F: 954.713.7700

Harrisburg

Penn National Insurance Plaza
2 North Second Street, 7th Floor
Harrisburg, PA 17101-1619
T: 717.257.7500 • F: 717.238.4622

Miami

Southeast Financial Center
200 S. Biscayne Blvd., Suite 3600
Miami, FL 33131
T: 305.428.4500 • F: 305.374.4744

Minneapolis

33 South Sixth Street, Suite 4750
Minneapolis, MN 55402
T: 612.217.7130 • F: 612.677.3844

New York

1270 Avenue of the Americas,
Suite 2005
New York, NY 10020
T: 212.980.7200 • F: 212.980.7209

Newark

One Riverfront Plaza
Newark, NJ 07102
T: 973.286.6700 • F: 973.286.6800

Philadelphia

Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
T: 215.972.7777 • F: 215.972.7725

Pittsburgh

One PPG Place
30th Floor
Pittsburgh, PA 15222
T: 412.209.2500 • F: 412.209.2570

Princeton

650 College Road East, Suite 4000
Princeton, NJ 08540-6603
T: 609.452.3100 • F: 609.452.3122

Washington

1919 Pennsylvania Avenue, N.W.
Suite 550
Washington, DC 20006-3434
T: 202.333.8800 • F: 202.337.6065

West Palm Beach

515 N. Flagler Drive
Suite 1400
West Palm Beach, FL 33401
T: 561.833.9800 • F: 561.655.5551

Wilmington

1201 North Market Street
Suite 2300 • P.O. Box 1266
Wilmington, DE 19899
T: 302.421.6800 • F: 302.421.6813

SAUL EWING
ARNSTEIN
& LEHR^{LLP}