

# What to Consider When Considering Arbitration


California Association of Independent Schools (CAIS) 2018 Annual Conference  
Presented by: Brian P. Walter, James Smith & Sarah Shulkind | January 27, 2018

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## Agenda

- Types of Arbitration Proceedings
- What Claims Are Subject to Arbitration?
- Reasons for (or Against) Arbitration
- Key Issues For Schools

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## What is an Arbitration?

- Non-judicial process for settling disputes using an independent third party (the arbitrator)
- Very different from a *mediation*
- Typically includes:
  - Hearing where evidence presented through witnesses and exhibits
  - Cross-examination of witnesses
  - Oral and written statements and briefs
  - Discovery, including depositions
  - Written decision that is final resolution of dispute

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**Types of Arbitration Proceedings**

- Private arbitrator
  - AAA, JAMS, etc.
  - Single or panel
  - Selection procedures – mutual, strike list, panel
- Judicial arbitration
- Religious arbitration

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**What Will Be Subject to Arbitration?**

- Enrollment agreement
- Employment agreement
- Other contracts (vendors, construction, etc.)

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**Reasons for (or Against) Arbitration**

- Enforceability
- Amount of damage awards
- Cost
- Confidentiality
- Insurance terms
- Dispositive motions
- Discovery limits
- Timing and appeal rights

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**Enforceability**

- Strong legal presumption in favor of arbitration
  - But frequently challenged and law constantly evolving
- Typically school must file a petition to compel arbitration
- Grounds to reject arbitration
  - Unconscionability
    - Both procedural and substantive
  - Denial of petition is appealable under state law and results in automatic stay

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**Amount of Damage Awards**

- Court litigation
  - Jury trial
  - Bench trial
- Civil arbitration
- Religious arbitration

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**Cost of Litigation**

- Arbitrator fees
  - School must pay all fees for employment arbitration
- Attorney's fees
  - For prevailing party?

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**Confidentiality**

- Ability to keep arbitration proceedings private?
  - Initial complaint often filed in court
  - Internet and social media
  - Consumer disclosure statutes
- Perception of confidentiality requirements
  - By school community and public
  - Consistent with core values?

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**Insurance Policy**

- Does it cover all costs of arbitration?
- Does insurer have to consent to arbitration?

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**Dispositive Motions**

- Available in court proceedings
  - Motion to dismiss or demurrer
  - Motion for judgment on the pleadings
  - Motion for summary judgment
- Available in arbitration?
  - Typically at discretion of arbitrator

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**Discovery Limits**

- Court proceedings
  - State court has minimal limits
  - Federal court generally has 10 deposition limit
- Arbitration
  - Typically at discretion of arbitrator

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**Timing and Appeal Rights**

- Court proceedings
  - Multiple layers of appeal before and after trial
  - Appeals can take years
- Arbitration
  - Extremely limited grounds to appeal
    - Errors of fact or law made by arbitrator are not grounds to appeal

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**Key Arbitration Issues for Schools**

- FAA Choice of Law provision in agreement
- Only include arbitration agreement in handbook?
- Specify arbitration rules to be used and attach a copy or link to website
- Waiver of Bane Act and Ralph Act claims?
  - Civil Code §§ 51.7, 52, 52.1
- Statement that any and all disputes covered by agreement
  - Avoid limiting it to enrollment agreement

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**Lessons Learned From Arbitration**

- Requires significant preparation
  - Heavy time demands imposed upon Head of School and key school administrators
    - Depositions
    - Attendance at each day of arbitration
- Importance of documentation of school decisions
  - Even for at-will employees
- Pay attention to handbook language
- Apply school rules consistently

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**Conclusion**

**Brian P. Walter**  
Partner | Liebert Cassidy Whitmore

**James Smith**  
Senior Claims Counsel | United Educators

**Sarah Shulkind**  
Head of School | Alice and Nahum Lainer School

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