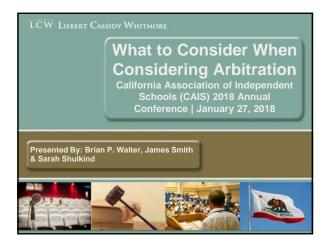
California Association of Independent Schools (CAIS) 2018 Annual Conference Presented by: Brian P. Walter, James Smith & Sarah Shulkind | January 27, 2018



#### Agenda

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

2 LCW LIEBERT CASSIDY WHITM

#### 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

LCW LIEBERT CASSIDY WHITMORE



Statewide Experts | Customized Solutions

1

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

Types of Arbitration Proceedings	
Private arbitrator	
– AAA, JAMS, etc.	-
- Single or panel	
- Selection procedures - mutual, strike list, panel	
Judicial arbitration	
Religious arbitration	
	-
4 LCW LIEBERT CASSIDY WHITMORE	
What Will Be Subject to	
Arbitration?	
Enrollment agreement	
Employment agreement	
Other contracts (vendors, construction, etc.)	
5 LCW LIEBERT CASSIDY WHITMORE	
	1
Reasons for (or Against)	
Arbitration	
Enforceability	
Amount of damage awards	
<ul><li>Cost</li><li>Confidentiality</li></ul>	
Insurance terms	
Dispositive motions	
Discovery limits	
Timing and appeal rights	

LCW LIEBERT CASSIDY WHITMORE

LCW LIEBERT CASSIDY WHITMORE

Statewide Experts | Customized Solutions

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

# **Enforceability** • Strong legal presumption in favor of arbitration - But frequently challenged and law constantly evolvina

- 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

## Amount of Damage Awards

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

# Cost of Litigation

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

LCW LIEBERT CASSIDY WHITMORE



Statewide Experts | Customized Solutions

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

#### 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?

10

ICW LIEBERT CASSIDY WHITMO

#### **Insurance Policy**

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

11

LCW LIEBERT CASSIDY WHITMO

## **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

12

LCW LIEBERT CASSIDY WHITMORE



Statewide Experts | Customized Solutions

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

# Discovery LimitsCourt proceedings

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

13

LCW LIEBERT CASSIDY WHITMOR

### **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

14

LCW Liebert Cassidy Whitmor

## **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

15

LCW LIEBERT CASSIDY WHITMORE

# LCW LIEBERT CASSIDY WHITMORE

Statewide Experts | Customized Solutions

5

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

#### **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

16

LCW LIEBERT CASSIDY WHITMOR

#### 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

17

LCW LIEBERT CASSIDY WHITMOR

