

# National Legal Trends & Practical Takeaways

ACIS 33rd Annual Leadership Conference

October 15, 2021

**Megan Mann**

NAIS Legal Counsel

mann@nais.org



*Nothing herein constitutes legal, medical, or financial advice. Content should be considered solely in conjunction with the oral statements made during this presentation and their veracity is subject to change due to the evolving nature of the topics covered.*

© National Association of Independent Schools

# thanks for having me

---

- **NAIS & my role: legal education & support**
  - 1:1
  - Publications: on the NAIS website, in the Bulletin (Legal News You Can Use/The Legal Tip of the Week)
  - Webinars: including the Trend Report; online recordings
- **Today's session**
  - Purpose - to put things on your radar
  - Recording, slides, questions
  - This afternoon's session



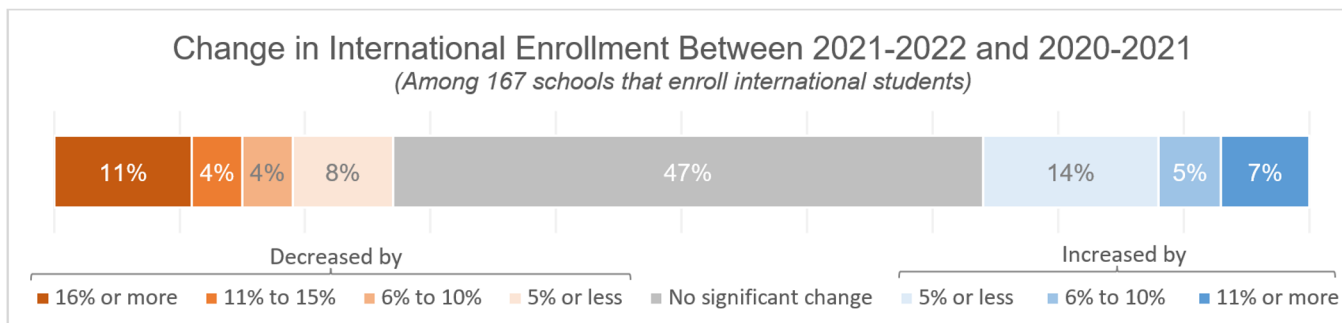
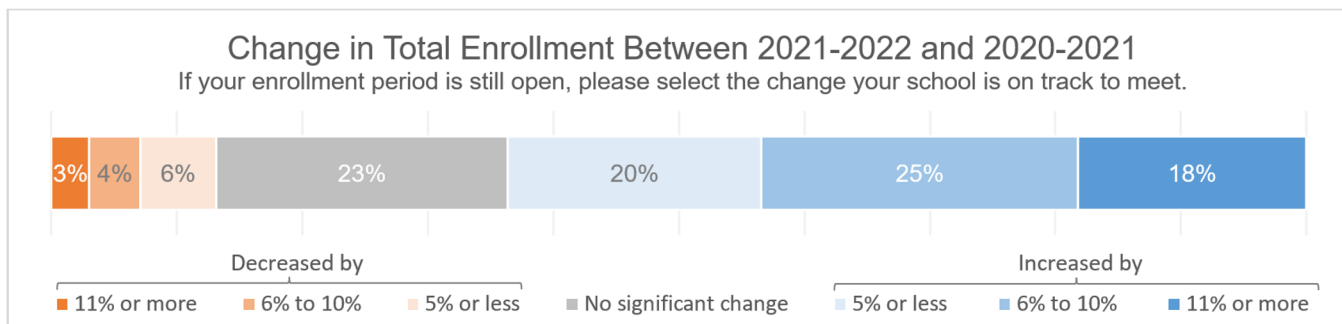
# this morning's session

---

- Latest research
- COVID-19
- Trustee role confusion
- DEI & the law
- Parent pushback
- Boundaries
- Governing student conduct
- Investigations
- Admissions
- Head of school employment contracts
- Who is HR?



# snapshot: enrollment results



Source: NAIS Snapshot, September 20 – 23, 2021. Fielded among 379 admissions directors.

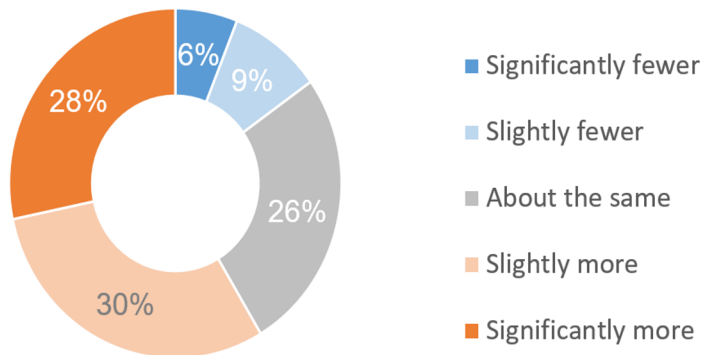


Nothing herein constitutes legal, medical, or financial advice. Content should be considered solely in conjunction with the oral statements made during this presentation and their veracity is subject to change due to the evolving nature of the topics covered.

© National Association of Independent Schools

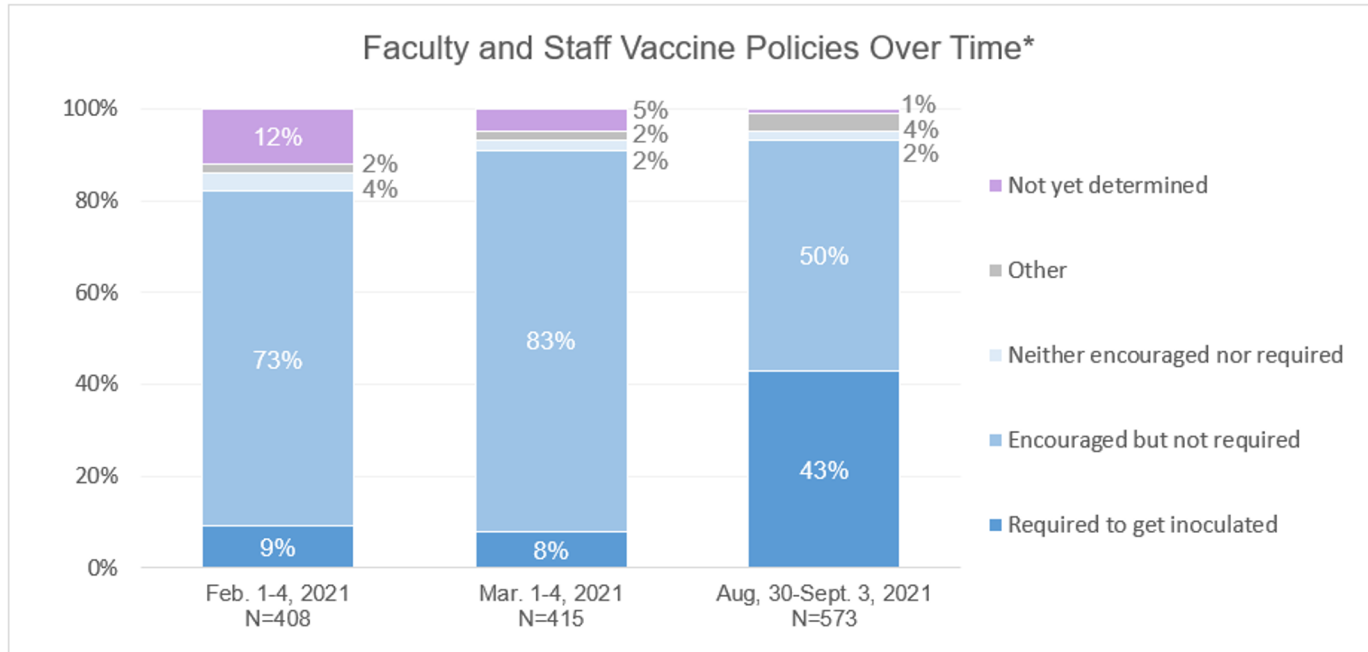
# snapshot: staff turnover

Compared to the previous year, how many job openings did your school post for the 2021-2022 academic year ?



Source: NAIS Snapshot, September 20 – 23, 2021. Fielded among 436 heads of school.

# snapshot: approach to COVID-19 vaccines



\* Results represent unique groupings of schools, not the same schools surveyed over time.

# more on COVID-19

---

- **Trending questions/issues:**

- Whether to mandate the vaccine for employees
- Whether to mandate the vaccine for children
  - Some or all
- How to handle exemption requests
- How to handle remote work requests
- When to test
- What information to share (with parents and other members of the community or the school community at large) and what information to seek from peer schools prior to events

# blurred lines: trustee role confusion

---

- **Not a new problem. And yet ...**
- **COVID brought boards into policy work & administration in a new way. Issues include:**
  - Overstep on COVID-related issues; allowing overstep to bleed into other areas; role confusion; trustees putting their “parent hats” on
- **Trustees should understand their duty of loyalty, which includes accepting board decisions, even when you disagree; their duty to care for & protect the assets of the organization; their confidentiality obligation**
  - Board training was and is incredibly important





# board training

---

- **Ideally part of the onboarding process, and then periodically for the entire board**
- **Outline the board's role; how a trustee should think about issues (e.g., not as a parent); explain duties and obligations; outline basic processes; make it clear that the board is not there to be an administrative appeal for head of school decisions**
  - Consider scenario work/table-top exercises
  - How can you educate parents on the board's role as well?



# a tricky spot for heads

---

- **We don't want our boards surprised on matters of:**
  - **Reputation**
  - **Liability**
  - **Money**
- **This contributes to the confusion. For example:**
  - Matters of DEI initiatives or a fundamental shift in the school's approach to governing student off-campus conduct may have liability or reputational repercussions.
  - Err on the side of over-informing the board if you aren't sure, and think in advance about when you want buy-in

# dei work development & the law

---

- **From a purely legal standpoint - please loop your counsel into the development of DEI initiatives**
  - E.g., new hiring or enrollment plans or the development of affinity groups
    - A note on AG/ERG legal challenges
- **Consider written policies (whether external or internal) that document the plan**
- **Consider training and communication to ensure consistency with the plan**



# parent pushback

---

- **Consider your communications strategies**
  - Think about when to write v. talk; when to listen v. talk; what questions to ask; remember that educators like to write (a lot) (said with kindness)
- **What policies or contract terms govern parent conduct?**
  - Review your family handbook and enrollment agreement
  - We've been saying it for years - parent comportment clauses
- **Check blindspots and consult with outside professionals**
  - Potential laws at play
  - Legal counsel; communications consultants



# boundaries

---

- **Again, not new, but we continue to hear about boundary-blurring (or potentially boundary-blurring) conduct**
- **Training**
  - The concern is with sexual and pre-sexual, but also both predatory and non-predatory boundary crossing
- **Ongoing communications**
- **Follow-up after incidents**



# governing student conduct

---

- **Feel free to join us this afternoon for a deeper dive ...**
- **What conduct do you govern, when, and how?**
  - Does it matter where it occurs? When?
  - Does it matter whether school property (laptops, internet) are involved?
  - Does it matter what type of conduct is involved?
  - Does it matter when and how it affects school time?
- **Conduct a jurisdictional audit and play out scenarios to determine your philosophy**
- **Do you need board buy-in or just to flag for the board (or neither)?**



# investigations

---

- **When to do them**

- The trend is to err on the side of doing them, but you need to understand *how* to do them

- **Who does them**

- For smaller, less sensitive matters, most schools will handle internally. The growing trend is to bring in outside investigators for matters that are larger, more sensitive, more complex, more likely to face scrutiny, and/or where those handling internally could be accused of bias later
- Choose wisely and consider privilege



# admissions

---

- **What are you asking for and why?**
  - Consider your goals and how you are using the information
  - Do you have a policy that explains your admissions practice and philosophy (internal or external)? For example, does it explain all of the race-neutral ways you recruit and enroll students?
- **Trending topics**
  - Photos
  - Gender/sex
  - Disabilities (including learning)
  - Lying on the application





# head of school employment contracts

---

- **Legal counsel**

- Both parties; consider who to bring to the table

- **IRS rebuttable presumption**

- Review comparability data and create contemporaneous documentation
- Why do we care? Schools can lose tax-exempt status; penalty taxes may be imposed on the head and trustees

- **Termination provisions**

- What are you saying, why, and what does it mean?



# who is hr?

---

- **Do you have HR (internal or outsourced)?**
  - Are they trained and do you support ongoing training?
  - Are employees trained on how to use HR?
- **Are you HR?**
  - Carve out time to do a mini HR audit
  - Who else can you loop in?
  - Do you understand when to document, to investigate, and what the reporting structure is at your school?

# Don't miss these NAIS resources!

- Register for upcoming NAIS events | <https://www.nais.org/events/>
- Save the Date: People of Color Conference 11/29-12/3 | <https://pocc.nais.org//>
- Get the brand-new NAIS *Trendbook* | [nais.org/bookstore](https://nais.org/bookstore)