Creative Revenue Streaming and Public Schools:

A Legal Discussion Regarding Non-Traditional, New and Creative Revenue Streaming Trends in Public Schools Nationwide

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A NOTE TO THE READER…

This paper provides an overview of the topic and is intended to bring awareness to some of these issues and give local practitioners a springboard from which to begin their own state-specific research. It is in no way intended to be a complete legal treatise on the topic, as such a work would fill volumes and could keep a researcher busy for months, if not years, due to the ever-changing landscape of public school revenue initiatives and the countless federal and state laws, regulations and non-regulatory guidance on these issues. However, if, in reviewing this information, you find additional information that you believe is worthy of addition or consideration, please feel free to contact me. Considering the breadth of the topic, I am sure that there are many examples (perhaps even obvious ones) that I missed. The practice of law is a continual act of learning, and I am a perpetual student in that regard. Comments and suggestions are greatly appreciated.

Numerous sample policies, agreements and contracts, and other resources are provided in the footnotes as samples from public schools across the nation. Please note that these samples are provided to enhance the discussion set forth within the article and should not be considered to be legal recommendations or legally-compliant models. While some were drafted by highly-regarded school law attorneys, some were provided by attorneys simply to demonstrate what their schools are doing, and others were obtained from public websites and other public sources (and as attorneys who serve public schools, we all know that schools do not always obtain legal advice before entering into contracts, adopting board policies or engaging in new initiatives). It is important to note that none of the attached documents were vetted for legal compliance by the NSBA or this author. Laws vary dramatically from state to state, and, even within a single state, specific factual circumstances and individual school characteristics can affect the legal defensibility of a specific document for a particular school. These samples are not being provided as a "one-size-fits-all" solution, but, rather, they are intended to serve as examples of what schools are doing and to provide language to be analyzed and evaluated by school counsel in light of the topics discussed in the article.

ABOUT THE AUTHOR…

Atty. Gilsbach is a former public high school English teacher who worked for over two years at the Pennsylvania Department of Education's Office of Chief Counsel during law school. She has been in private practice representing school clients for over ten years, and, in addition to being an attorney, she also currently serves as the Director of Professional Education and Policy Development at the Greyfriars Institute, a nonprofit educational organization dedicated to providing professional development in the area of school law to school leaders both in Pennsylvania and nationally. She is an experienced speaker who presents to attorney and school leadership groups throughout Pennsylvania and nationally. She is an officer of the Pennsylvania School Board Solicitors Association and has been voted one of Pennsylvania's Rising Star attorneys by SuperLawyers magazine for the past four years.

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Introduction

With $47 million being cut from the state budget, public school superintendents in Green Country, Oklahoma, are facing Oklahoma public schools' worst financial crisis in decades.[1] Tulsa public schools will be required to reduce spending by $2.1 million, Arrow public schools is facing a loss of $1 million, and public schools throughout the state are feeling the blow.[2] The cuts will affect buses, professional development, extracurricular activities, and even school lunches.[3] Pennsylvania, which already has some of the worst funding disparities in the nation between low-income and high-income schools,[4] is, at the time of the drafting of this article, facing a nearly 7-month state legislative budget impasse. Public schools were forced to operate without funding for the first half of the school year, and many, including the School District of Philadelphia, were prepared to close their doors in January if the legislative standoff continued.[5] Standard & Poor's withdrew its ratings on a state government program that helps school districts borrow by giving a guarantee to repay bondholders, affecting some of the state's most needy schools, including Philadelphia, Reading, Bethlehem, Scranton, Erie and York, and other credit rating agencies may follow suit, prohibiting many school districts from obtaining loans.[6] The legislature recently passed a partial-funding measure, but the Pennsylvania School Boards Association has filed a lawsuit seeking an order to compel the continued timely release of federal and state funds owed to school districts across the commonwealth.[7]

Across the nation, public school districts are facing tremendous financial crises. Because of this, they are forced, and often highly motivated, to explore new and innovative ways to raise funds. Each potential revenue source, however, presents its own set of costs, risks, and liabilities. The burden often falls on school attorneys to help their clients make informed decisions, weighing the risks and the benefits, and guiding them to the most legally-defensible course of action once the decision has been made by the school. With many of these sources of revenue, significant legal issues can be resolved through careful policy drafting and watchful, compliant district policies and practices. With some, carefully-constructed contracts can eliminate significant risk.

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[1] Allison Harris, *Superintendent: Budget Cuts 'Worst Financial Crisis To OK Schools In Decades'*, Newson6.com (January 18, 2016). Available at: http://www.newson6.com/story/30995672/superintendent-budget-cuts-worst-financial-crisis-to-ok-schools-in-decades.

[2] *Id.*

[3] *Id.*

[4] Rebecca Klein, *School Funding Inequality Makes Education 'Separate And Unequal,' Arne Duncan Says,* Huffington Post Online (March 16, 2015). Available at: http://www.huffingtonpost.com/2015/03/13/arne-duncan-school-funding-disparities_n_6864866.html.

[5] Associated Press, *Superintendent: Phila. Schools Face Shutdown In January Due To State Budget Impasse,* CBS Philly (December 15, 2015). Available at: http://philadelphia.cbslocal.com/2015/12/15/superintendent-phila-schools-face-shutdown-in-january-over-pa-budget-stalemate/.

[6] Marc Levy, *Schools may lose ability to borrow due to Pa. budget stalemate,* Pocono Record (December 14, 2015). Available at: http://www.poconorecord.com/article/20151214/NEWS/151219746.

[7] PSBA, *PSBA files lawsuit to force the Commonwealth of Pennsylvania to release funds owed to schools* (January 8, 2016). Available at: https://www.psba.org/2016/01/psba-files-lawsuit-funds-schools/. Full-text version of the lawsuit is available here: https://www.psba.org/wp-content/uploads/2016/01/PSBA-Petition-for-Review-01122016.pdf.

In many cases, it is a combination of board policies, school practices and protective and defensible contracts that can provide the best legal protection.

This paper discusses some of current revenue trends of public schools and the legal issues that surround each. It also addresses contract, policy and practical considerations that can be made to help schools reduce the amount of liability associated with a given revenue initiative.

Advertising

Advertising is a prime source of revenue for some schools. Web surfers who click onto the website of the Humble Independent School District in Humble, TX, will immediately see advertisements on the District's homepage.[8] The District also sold the naming rights to the entryway of the football stadium to a GMC dealer for $100,000, painted the name of a Mazda dealer on the turf for $350,000, and named the press box after a recycling and landfill company for $45,000.[9] Humble IST even has full-length ads on its school busses.[10] To facilitate the sale of the ads and help obtain corporate sponsorships, the school hired a media company, which also represents dozens of other schools and takes a whopping 40% of the revenue from the ads in exchange for its services.[11] Other Texas schools, however, have not found advertising to be worth the effort. The Plano Independent School District outside of Dallas also tried ad sales and have found that they do not generate sufficient revenue to justify the costs of managing the advertisements, including vetting ads and advertisers.[12]

For cash-strapped school districts, the selling of advertisements seems like a quick and easy way to make money. It certainly appears to have worked for Humble IST. But school-based advertising can take many forms, and it is not for all communities. Critics, such as Nancy Boninger, a researcher with the National Education Policy Center at the University of Colorado in Boulder, argue that advertisements in schools is not consistent with the teaching of critical thinking, and often what is being sold can run counter to what is taught in the schools. In addition, she argues, ads often come with polarized gender stereotypes and materialist perspectives, which can harm students' self-esteem.[13]

Whether a school has been profiting from advertising for years or is new to the market, it will undoubtedly need a lot of advice from legal counsel. While it can be lucrative, advertising on school grounds is rife with potential legal problems and pitfalls, and legally-defensible school

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[8] www.humbleisd.net.

[9] Morgan Smith, *Seeking Money, Texas School Districts Turn to Advertising*, NYTimes.com (February 16, 2012). Available at: http://www.nytimes.com/2012/02/17/education/texas-schools-turn-to-ads-in-search-of-needed-money.html?pagewanted=all&_r=0.

[1010] *Id.*

[1111] *Id.*

[12] *Id.*

[13] *Id.*

policy and advertising practice are key to minimizing legal liability.[14] The next pages contain a summary of some of the legal issues and potential solutions.

Advertising on School Grounds: Opening the Door to the Limited Public Forum

"Congress shall make no law… abridging the freedom of speech."[15] In public schools, that is *far* easier to state than to implement or understand. Courts have interpreted the First Amendment to offer varying levels of protection, depending upon the speaker, the message, and the location. Different rules apply to political speech, government speech, commercial speech, student speech, unprotected speech, etc. Scholars have been pondering, debating, and writing treatises about this ever-evolving topic for decades. For the purposes of advertising in schools, however, there are a few basic principles that need to be understood. Generally, public schools are considered a nonpublic forum. Third parties have no Constitutional right to speech within the schools unless the school, itself, provides it by opening a forum. A limited public forum is opened by allowing third-party access through general advertising rules and/or permissions.

In a limited public forum, schools may restrict speech with some limitations.[16] When determining whether a forum is nonpublic or limited, there are two basic factors. Courts will look at what access has been granted in the past and what the school's policy/procedures permit and/or limit. For example, if a district has a policy that permits advertising on fence signs around its football stadium, a limited public forum exists. Policy is not everything, though. Where a school's *practice* differs from its *policy*, the practice will likely be the determinative factor. For instance, if a district has a policy that does not permit advertising, but the athletic department has traditionally allowed advertising at its events, and the school has not prohibited that practice, a limited public form exists in that case, as well, due to the fact that the school's practices permit the advertising.

Schools may have more than one type of forum within their boundaries.[17] For instance, a school may permit advertising in its football stadium but not within the school building, itself. In that instance, the school has created a limited public forum in the football stadium but a nonpublic forum in the school building. Definitive policy language, as well as consistent practices that carefully adhere to the policies set forth, ensure that these designations as determined by the school board and/or school administration, remain clear and accurate. In such cases, the rules and legal requirements are clear. Trouble brews where school administrators permit flexibility with rules and policy language, however. Many school administrators open schools to limited-public-forum status without realizing it through their practices.

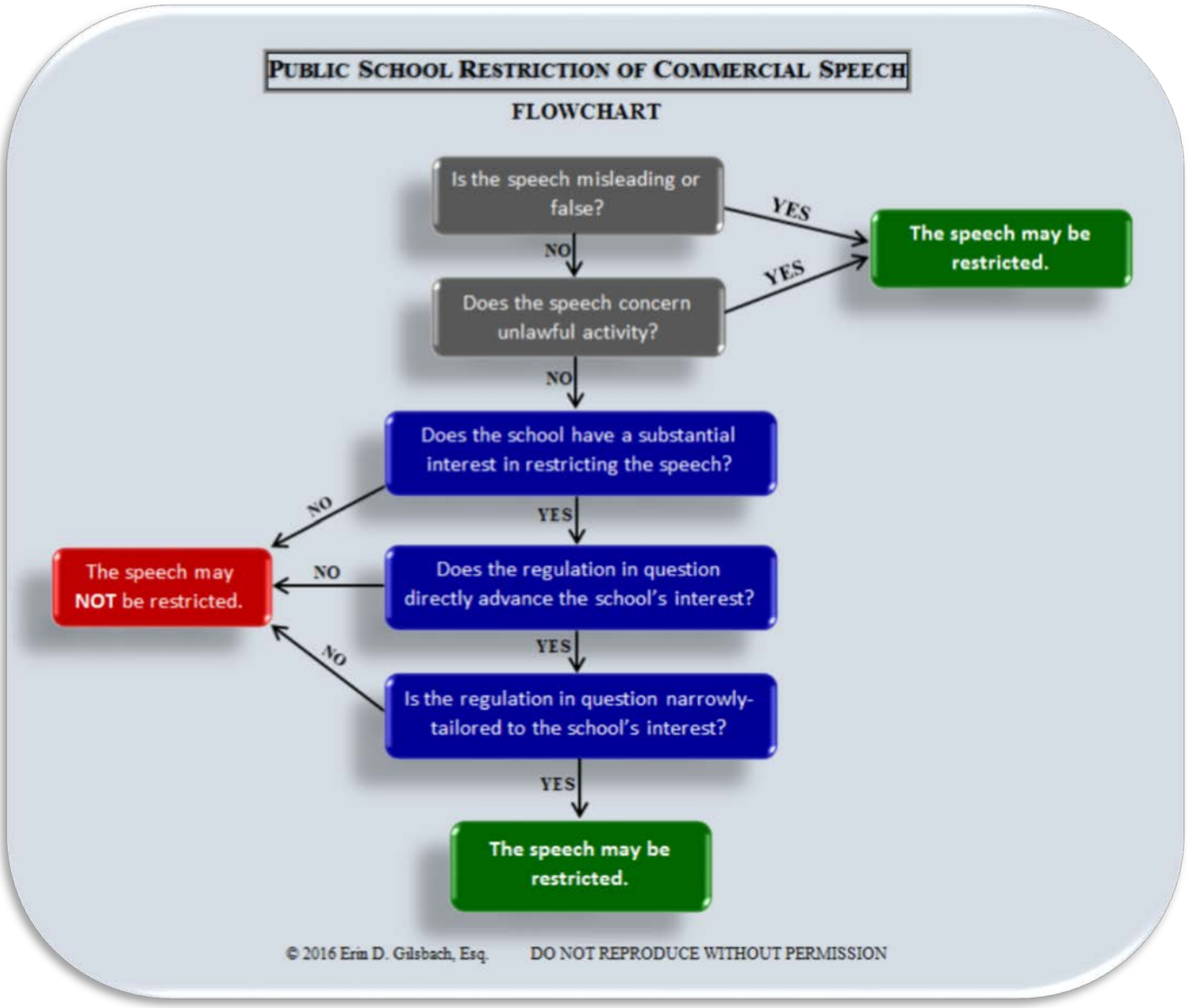
[14] *See* the advertising policy for the Humble Independent School District (referenced above), here: http://pol.tasb.org/Policy/Download/593?filename=GKB(LOCAL).pdf.

[15] U.S. Const. Amend. I.

[16] *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. Of the Law v. Martinez,* 561 U.S. 661, 130 S. Ct. 2971 (2010).

[17] *Gregoire v. Centennial School District,* 907 F.2d 1366 (ed Cir. 1990).

In a nonpublic forum, with both private and commercial speech, schools may make time, place and manner restrictions, but all restrictions must be content-neutral.[18] Where a limited public forum is opened for the purposes of commercial speech, a test is applied to assess whether restrictions on that commercial speech are constitutional.[19] The test is presented in the flowchart, below:



[18] *Id. See also Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. Of the Law v. Martinez,* 561 U.S. 661, 130 S. Ct. 2971 (2010).

[19] *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 100 S.Ct. 2343 (1980). The original 4th-prong of the *Central Hudson* test (what would have been the last question on the flowchart) held that the regulation must be narrowly drawn and no more extensive than is necessary to serve the state's interest. This prong was strengthened in *Bd. of Trustees of Suny v. Fox*, 109 S.Ct. 3028 (1989), and the flowchart, here, reflects that change.

A tricky aspect of the analysis is the fact that there is no clear-cut definition of "commercial speech," and many scholars believe that the fact that the U.S. Supreme Court has not yet provided one is due to the fact that the classification of commercial speech is inherently difficult.[20] Private speech, however, is afforded more protections, and all permissible restrictions in a limited open forum (time, place and manner restrictions and restrictions based on subject matter and/or class of speaker) must be viewpoint-neutral.

To make matters even more complex, commercial speech may be intermingled in a single ad with noncommercial private speech, resulting in what the U.S. Supreme Court has deemed to be "mixed motives" speech.[21] The determinative factor as to whether the speech is "mixed-message" speech, rather than simply two different components of speech "act" are "inextricably intertwined. Examples of "inextricably intertwined" speech are an advertisement for a 4th-of-July sale that contains patriotic symbols and messages or solicitation of contributions for a charitable organization.[22] The Court affords "mixed-message" speech the same protections as private speech, which is the greater of the two protections.[23] Not all speech acts that contain a commercial component and a private speech component are "inextricably intertwined," though. In *Board of Trustees of the State University of New York v. Fox,*[24] the university wished to ban on-campus Tupperware parties using the less-protective commercial speech analysis. The opponents to the ban argued that the application of the more restrictive test was unconstitutional. They argued that, because Tupperware parties touched upon other topics, "such as how to be responsible and how to run an efficient home," the parties constituted "mixed-message" speech. The Court didn't buy the argument, humorously holding that "[n]o law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares."

So what are schools to make of these analyses? The safest, most legally-conservative course of action is to presume that all speech will be afforded the broader protections available to private speech in a limited public forum. In today's world of market research and savvy, effective advertising, the vast majority of ads are going to contain at least some non-commercial speech. To expect school administrators to perform a Blackmun-esque legal analysis for every submission is, at best, impractical, and arguably impossible, given the frequently confusing analyses of "mixed-message" cases. Schools should, rather, craft policies to assume that the speech should be afforded the standard limited-open-forum protections and limit their regulations to time, place and manner restrictions and viewpoint-neutral subject matter and class-of-speaker restrictions.

Determining the Right Level of Restriction for a School

[20] *See* Robert Post, *The Constitutional Status of Commercial Speech,* 48 UCLA L. Rev. 1, 7 (2000); Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech,* 58 Mo. L. Rev. 55, 146 (1999).

[21] *See, e.g., Murdock v. Pennsylvania,* 319 U.S. 105 (1943), (holding that that an ordinance and license tax on evangelists was unconstitutional due to the fact that the sale of religious literature does not turn evangelism into commercial speech).

[22] *See Riley v. National Federation of the Blind,* 487 U.S. 105 (1943).

[23] *Id.*

[24] 492 U.S. 469 (1989).

Schools can eliminate advertising-related liability altogether by adopting policies that do not permit 3rd-party advertisements on school grounds. However, in today's economic climate, schools may depend upon at least *some* advertising revenue. Thus, school boards must carefully weigh the financial need against the complexities of First-Amendment rights of advertisers to determine the best course of action.

In limited public forums, schools may make subject matter or class-of-speaker restrictions as long as they are reasonable and viewpoint-neutral. A policy is viewpoint neutral if it restricts all advertising speech on a given subject.[25] For instance, schools could make generalized restrictions prohibiting all religious and/or political messages in advertisements. In making such restrictions, the school is limiting the types of messages that can be included without basing the restriction on any specific viewpoint.

One example of this type of restriction can be found in *DiLoreto v. Downey School District.*[26] In that case, a school booster club raised funds by soliciting ads from local businesses, and the ads were posted on the baseball field fence. The Loreto family trust purchased an ad with the message "For Peace in Our Day! Pause and Meditate on These Principles to Live By!" and, beneath that text, included the text of the 10 Commandments. The school rejected the sign. The 9th Circuit applied the nonpublic forum analysis. In the past, the school had rejected advertisements for taverns and Planned Parenthood, both considered controversial matters. In addition, the school never permitted any political, religious or controversial public issues in its advertising. The Court found that the restriction was reasonable. The forum was opened for the express purpose of commercial advertising and for the school to make money, not for the purpose of political or religious expression. The Court also held that the school's restrictions targeted a particular subject matter, not the particular views taken by the speakers on a subject. The Court noted that the district's decision did not disfavor religious viewpoints, because all ads with a political, social or controversial agenda were excluded. Note that it was the *content* of the ad that was restricted in this case, *not* the speaker. Had a religious organization purchased the ad to advertise for a product or service, the result may have been different.

In *Lebron v. Amtrak,*[27] Lebron rented a billboard and developed an advertisement that he characterized as an allegory about the destructive influence of a materialistic culture. The 2nd Circuit applied the limited public forum analysis due to the fact that, while Amtrak is not incorporated as a government entity, the public and private entities functioned together to the point where the First Amendment applied to restrictions of speech made by Amtrak. In that case, Amtrak prohibited political speech in all advertising space, and the Court upheld this as a reasonable and viewpoint-neutral restriction.

Schools should be aware, however, that, as explained above, it is not only the restrictions set forth in the entity's policy that matter, but also the history of enforcement of such restrictions. For instance, in *Christ's Bride Ministries, Inc. v. SEPTA,*[28] South East Pennsylvania Transit Authority officials removed 4-by-5 foot posters sponsored by the religious group that said "Women Who Choose Abortion Suffer More & Deadlier Breast Cancer." Although SEPTA did

[25] Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).
[26] *DiLoreto v. Downey Unified School Dist. Bd. of Educ*., 196 F.3d 958, 968 (9th Cir. 1999).
[27] 513 U.S. 374 (1995).
[28] 148 F.3d 242 (3d Cir. 1998).

have a policy prohibiting political and religious messages, it did not enforce that policy. In addition, the posters were removed not due to the policy restrictions, but, rather, due to the public outcry related to their content. The 3rd Circuit noted that SEPTA had accepted numerous advertisements for display, including on the topics of religion and abortion. "In its efforts to generate advertising revenues, SEPTA permitted abortion-related and other controversial advertisements concerning sexuality." SEPTA's actions, in that case, took precedence over the language of the policy for the purposes of the First Amendment determination. This is an important training point for school administrators. Their actions can negatively impact the legal-defensibility of even the most carefully-crafted policy language.

Side-Stepping the Forum Analysis: Is Endorsement the Key?

An issue that has garnered a lot of attention in the courts, and that we will likely see far more of, is the distinction between *government speech* and commercial/private speech. The Palm Beach County School District recently successfully argued a case on this specific issue in *Mech v. School Bd. of Palm Beach County*.[29] In that case, the school board adopted a policy permitting the hanging of banners on the fence of the football stadium to recognize sponsors of the athletic program. The policy clearly stated the District's intent not to open any type of public forum but, instead, serve as "recognition of business partners on school campuses."

Mech has what the 11th Circuit court called a "unique resume." The service promoted on the banner at issue in the case was a math tutoring service called "The Happy/Fun Math Tutor." Mech has a master's degree, was enrolled in a Ph.D. program at Florida Atlantic University, had secondary-level teacher certification in Florida, and taught mathematics at Palm Beach State College. As for the "unique" part – Mech was also a retired porn star who had performed in hundreds of porn films and was the owner of a pornography company. And the crux of the problem… the tutoring service and the porn company were located at the same address.

The District was not originally aware of the link between Mech's two businesses. In fact, in 2010, representatives of the school encouraged him to sponsor one of the banners, which required a minimum donation of $250-$650. When the school discovered the connection to the pornography company (through complaints of other parents), they removed the banner and informed him that his position with the pornography company, in conjunction with the fact that it shares the same principal place of business with the tutoring company, "creates a situation that is inconsistent with the educational mission of the Palm Beach County School Board and the community values."

The lower court held applied a First Amendment analysis, holding that the school was permitted to remove the banner due to the fact that they were removed due to the common ownership of the two companies, not due to the banner's content. The 11th Circuit affirmed the

[29] Special thanks to **JulieAnn Rico, Esq.,** Palm Beach County School District Legal Counsel in West Palm Beach, FL, for bringing my attention to this fascinating case, which was successfully argued by the District's in-house counsel.

lower court's decision, but on different grounds. The 11th Circuit stated the issue clearly and succinctly:

> If the banners are government speech, Mech loses. The Free Speech Clause of the First Amendment 'restricts government regulation of private speech; it does not regulate government speech.' […][30] When the government exercises 'the right to speak for itself,' it can freely 'select the views that it wants to express.'[31] This freedom includes 'choosing not to speak' and 'speaking through the … removal' of speech that the government disapproves.

The Court ultimately determined that the banners were, in fact government speech, relying heavily on a U.S. Supreme Court case, *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,[32] which was decided only a few months before the 11th Circuit's decision in *Mech. Walker* established a 3-prong analysis for differentiating government speech from private speech, which the 11th Circuit applied in *Mech.* In *Walker,* the "speech" at issue was a specialty license plate. In that case Texas Division of Sons of Confederate Veterans (SCV) applied to the Texas Motor Vehicles Board for a specialty license plate featuring the organization's logo—a square Confederate battle flag framed by the words "Sons of Confederate Veterans 1896." In determining that the decision of whether or not the denial of the logo was a permissible expression of government speech or a violation of the SCV's First Amendment rights, Justice Breyer, writing for the Court, considered three factors: 1) the historical context of the speech (i.e., the specialty plates) and whether there is a history of state communication,[33] 2) how closely the plates were linked to the state and whether a reasonable observer would conclude that Texas agrees with the message displayed;[34] and 3) whether the state had "direct control over the messages".[35]

The 11th Circuit used the 3-prong test from *Walker* to reach its finding in *Mech.* First, it considered the historical context of the banners. The Court determined that there was no relevant history, due to the "relatively recent vintage" of the banner program. While the Court maintained that this "absence of historical evidence" weighed in favor of Mech, it also determined that that factor, alone, was not determinative, holding that "a long historical pedigree is not a *prerequisite* for government speech." Thus, the Court went on to the second factor.

In determining whether an observer would reasonably believe that the school had endorsed the message, the Court noted that the banners are hung on school fences and that government property is "often closely identified in the public mind with the government that owns the land."[36] This

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[30] Here, the Court cited *Pleasant Grove City v. Summum*, 555 U.S. 460, 555, 129 S. Ct. 1125, 1131 (2009), (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229, 120 S. Ct. 1346, 1354 (2000)).

[31] Here, the Court cited *Downs v. L.A. Unified Sch. Dist.,* 228 F.3d 1003, 1012 (9th Cir. 2000) (citing *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 674, 118 S. Ct. 1633, 1639 (1998)).

[32] 135 S. Ct. 2239 (2015).

[33] Finding that "state speech has appeared on Texas plates for decades."

[34] Finding that the plates serve the official government purposes of registration and identification that the state name appears on every plate, that car owners are required to display them, and that Texas owns both the plates and the designs themselves.

[35] Finding that the state did maintain significant control over the message due to the fact that Board approval was required for each and every design, the state dictates the design, typeface, color and alphanumeric pattern for all license plates, and that the stated had, in fact, rejected at least a dozen designs.

[36] Quoting *Summum,* 555 U.S. at 472, 129 S. Ct. at 1133.

consideration is somewhat challenging with regards to school speech cases, due to the fact that, if this were the only consideration applied in the analysis, anything displayed on school property could be considered to meet this second prong of the *Walker* test. However, the 11th Circuit also went on to note that the "governmental nature" of the banners is, indeed, "clear from their faces"[37] due to the fact that the banners bear the school's initials, are printed in the school's color, and identify the sponsor as a "Partner in Excellence."

Finally, the 11th Circuit held that the banners did meet the government-control prong of the test due to the fact that, similar to the Texas Motor Vehicles Board in *Walker*, the school controlled the design, typeface and color of the banners. In addition, the schools also dictated the information that the banners could contain, regulated their size and location and required the inclusion of the school's initials and the "Partner in Excellence" message.[38] Finally, the school principals were required to approve every banner. The Court held that, as in *Walker,* the fact that the private parties take part in the design of the message does not mean that the banner is not ultimately government speech.

It will be interesting to see how other circuit courts interpret *Walker*. Schools may have difficulty with this concept of government speech, due to the fact that it is easy to confuse "recognition" in this context with "endorsement." Policy language should carefully and specifically set forth that the school does not endorse or make any warranties, determinations or recommendations regarding those entities that they are "recognizing." This will help protect against any Establishment Clause arguments that might be made that are not precluded under the analysis in *Walker*.

School Bus Advertisements

Whether schools do or even *can* permit advertising on school buses is a matter of state law.[39] Whether states allow internal or external advertising on school buses is determined by state legislatures and can be a very sensitive political issue. Schools must first determine whether and to what extent they are legally permitted to have advertisements on the buses and then whether they, in fact, want to have them. Administrators and board members need to keep in mind that the same legal rules that apply to signs on the football stadium with regards to restrictions of speech in a limited public forum also apply to school buses. Internal bus advertising has been criticized due to the fact that it markets to students as a captive audience.[40] The National Association of State Directors of Pupil Transportation Services (NASDPT) have issued a white paper opposing

[37] *Id. at* 555 U.S. at 471, 129 S. Ct. at 1133.

[38] The Board's current policy regarding the fence screen "Business Partnership Recognition" program was in effect at the time that the banner was removed by the District and is available here: http://www.schoolboardpolicies.com/p/7.151.

[39] A comprehensive resource summarizing state school bus advertising laws is: Jennifer L. Pomeranz, *The Wheels on the Bus Go "Buy Buy Buy": School Bus Advertising Laws,* Am J Public Health (September 2012), *available at:* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3482098.

[40] Jennifer L. Pomeranz, *The Wheels on the Bus Go "Buy Buy Buy": School Bus Advertising Laws,* Am J Public Health (September 2012), *available at:* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3482098.

external advertisements on school buses.[41] In the paper, the NASDPT raises the issue that the traditional "school bus yellow" color is a safety feature, making schools buses universally easy to recognize, and that external ads may hide that color.[42] Additionally, the paper examines the significant issue of distracted driving and points out the harm that may be caused where another driver is distracted by the advertisements and does not notice the bus stopping.[43] Finally, it points out the significant issue of potential liability and lawsuits caused by First Amendment issues related to the advertisements, themselves (see "Limited Public Forum" section, above).[44]

Marketing of Food on School Grounds and Impact of New USDA Regulations

On February 26, 2014, the USDA Food and Nutrition Service (FNS) issued a proposed rule requiring schools to have a policy regarding the marketing of food and beverages "on the school campus."[45] "Marketing," for the purposes of the rule, is defined as "advertising and other promotions in schools." Under the proposed §210.30, schools would be required, in their wellness plans, to include policies that allow marketing of only those foods and beverages that may be sold on the campus during the school day, i.e., those foods and beverages that meet the requirements set forth in the Smart Snacks interim rule.[46]. The Department of Agriculture, in its background information to the proposed rules, [47]noted that:

> Food marketing commonly includes oral, written or graphic statements made for the purposes of promoting the sale of a food or beverage product made by the producer, manufacturer, seller, or any other entity with a commercial interest in the product. [*citation omitted*]. Food and beverage marketing may be present in areas of the school campus that are owned or leased by the school and used at any time for school-related activities such as the school building or on the school campus, including on the outside of the school building, areas adjacent to the school building, school buses or other vehicles used to transport students, athletic fields and stadiums (e.g. on scoreboards, coolers, cups and water bottles), or parking lots.[48]

The National School Boards Association provided formal written comment in response to the proposed rules,[49] stating that the new restriction on advertising was an overreach of the

[41] NASDPT, *Position Paper: Advertising on School Busses,* (2011). http://www.nasdpts.org/Documents/Paper-AdvertisingOnSB-3-11.pdf.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] 7 CFR §210.30(c)(1).
[46] Schools may set more stringent rules, such as prohibiting marketing of food and beverage altogether.
[47] 79 FR 10693.
[48] *Id.*
[49] Thomas J. Gentzel, *Letter to USDA re: Local Wellness Policy under the Healthy Hunger-Free Kids Act*, NSBA (April 28, 2014), available at: https://www.nsba.org/sites/default/files/reports/4-28-

Department of Agriculture's authority. The comment also pointed out the negative impact that such a policy, if implemented, would have on public schools.

Certainly, if implemented, this requirement will have a significant economic impact on the schools with respect to their ability to raise funds through advertising. The language is, indeed, overly-broad, as NSBA points out in its written response, and legal challenges will likely follow if the language is not substantially revised.

Corporate Naming of School Facilities

Similar to general advertising rules, corporate naming raises issues of potentially opening a limited public forum. These issues are compounded by the fact that the naming of a facility necessarily constitutes a longer-term commitment, policies and contracts regarding naming of facilities would necessarily require a great deal of careful drafting, legal consultation, and planning.

Schools should carefully consider the length of the contracts in naming situations. Contracts for naming do not necessarily need to extend for the full life of the building or property being named. Schools should also consider placing limitations on naming rights, and school attorneys should research state law to determine whether a particular contract may be prohibited by law.[50] The length of the contract should be carefully considered when assigning naming rights or developing naming rights policies.

Naming Facilities after Individuals

Often, schools will permit naming rights to be extended to individuals as well as corporate sponsors. Schools should proceed with great caution in such circumstances. Many will recall the photos of the statue of Joe Paterno being covered by a large sheet. Prudent policies will set forth specific language establishing criteria for determining whether an individual may be named. The policy should take into consideration the individual's achievements, reputation, and history. Because a full assessment of these things is impossible while the individual is living, since many of their actions are yet to come, it is best for schools to require, via policy, that the individual has been deceased for a minimum of five or ten years. That way, a review and assessment of the individual's life, including a review of any potentially unsavory aspects of the individual's character, will more readily be able to be revealed. The longer the "waiting period," the less likely it will be that significant issues with the individual's character will arise.

Schools should also be extremely careful about permitting naming "in memorium." While it is certainly understandable to desire to honor the memory of a deceased student, alumni or faculty member, the same 5-year waiting period should be instituted. Schools should have a definitive policy in place regarding the establishment of a memorial or naming of school property (even a bench or tree) for deceased students. The issue of naming and memorialization is

2014%20Comments%20onLocal%20School%20Wellness%20Policy%20Implementation%20under%20the%20Healthy,%20Hunger-Free%20Kids%20Act%20of%202010.pdf.

[50] For instance, some states, such as New Mexico, have limits on multi-term contracts. New Mexico Procurement Code Section 13-1-150.

extremely difficult for schools when it is related to the recent suicide of a student.[51] There are many who argue that, for both liability purposes and psychological purposes, student suicides should not be memorialized on school grounds due to the concern of copycat suicides related to the perceived glorification of the memorialized student. The National Association of School Psychologists has indicated "…both the National School Safety Center and Lieberman (Richard, PhD, school psychologist and consultant to the Los Angeles Unified School District's Suicide Prevention Unit) agree that no memorial service should be held at the school because it places the deceased student in the position of being a role model."[52] The American Foundation for Suicide Prevention shares the view that memorials should not be held on school grounds, but provides this guidance for schools:

> Some communities wish to establish a permanent memorial (sometimes physical, such as planting a tree or installing a bench or plaque; sometimes commemorative, such as a scholarship). Others are afraid to do so.
>
> While there is no research to suggest that permanent memorials per se create a risk of contagion, they can prove to be upsetting reminders to bereaved students, and therefore disruptive to the school's goal of maintaining emotional regulation. Whenever possible, therefore, it is recommended that they be established off school grounds. Moreover, the school should bear in mind that once it plants a tree, puts up a plaque, installs a park bench, or establishes a named scholarship for one deceased student, it should be prepared to do so for others, which can become quite difficult to sustain over time.[53]

The Ogden City School District in Ogden, UT, recently faced this issue. The *Standard Examiner* website describes a policy that was ultimately passed by the District in the spring of 2015, quoting Zac Williams, spokesperson for the District:

> Acceptable memorials are generally one-time, short-duration activities — something in the moment versus ongoing. For example, if a student athlete died and the family wanted to donate new equipment for the football team, the parents could present the items and say the gift is in honor of their son. They could not, however,

[51] See the ABC News Article, High school: No yearbook memorial for student who committed suicide, (October 15, 2012), available at http://usnews.nbcnews.com/_news/2012/10/15/14451701-high-school-no-yearbook-memorial-for-student-who-committed-suicide?lite, for a discussion regarding schools who have faced this difficult issue.

[52] National Association of School Psychologists, *From Teen Suicides: Life, After Death*, NASP website, www.nasponline.org.

[53] American Foundation for Suicide Prevention, *After a Suicide: Toolkit for Schools,* Suicide Prevention Resource Center (2011). Available at https://www.suicidepreventionlifeline.org/App_Files/Media/PDF/sprc_online_library.pdf.

> have a label honoring their son permanently affixed to the equipment.
>
> "They also couldn't have a John Doe memorial bench placed in the school hall with the date of death," said Williams. "Because it's a closed environment, having names, pictures and a date of death is a visual reminder to everyone in that environment of that tragedy."
>
> Such a reminder could lead to suicidal tendencies for some students, he said, emphasizing that the policy is based on research and best practices from mental health professionals.[54]

Regardless of what the school ultimately decides, the decision should be made *before* a death occurs so that it is not being made reactively.

Website Advertising and Corporate Sponsorships

The Hemlock Public School District in Hemlock, Michigan, proudly displays a link to Dell's website wherein website visitors can receive $50-$100 off of a Dell PC priced at $499 and up.[55] The Prince William County Public Schools in Virginia, school websites include clickable business logos that link to advertisers' websites. A Groupon ad was prominently placed on its homepage.[56] "It's not gaudy and it's done in a manner consistent with our school system philosophy," says spokesman Ken Blackstone.[57] The district began Web ads in fall 2008, and met its goal of raising $75,000 in the first year of advertising.[58] Website advertisements can often be quite lucrative, with some offering pay-per-click benefits in addition to lease-of-space arrangements, but it is up to the individual school boards to determine whether this type of revenue-building is right for their districts.

Schools receiving e-Rate funding must comply with the Children's Internet Protection Act (CIPA).[59] Schools that permit the use of advertising on school websites should check with legal counsel to ensure that the type of advertising being considered will not require compliance with the Children's Online Privacy Protection Act (COPPA).[60] While schools do not generally fall under COPPA, the type of advertising being permitted may unwittingly subject the school to

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[54] Becky Wright, *Ogden Schools Consider Restricting Student Memorials*, Standard Examiner (May 28, 2015). Available at http://www.standard.net/Education/2015/05/27/Ogden-School-Board-to-discuss. See the Board-approved Ogden City Schools Memorials policy here: http://ogdensd.org/brd_pol/7.21%20%20Student%20and%20Staff%20Memorials.pdf.

[55] *See* Hemlock School District's "Technology" page, available at: http://hemlock.cyberschool.com/District/Department/17-Technology.

[56] Groupon ad was present on January 26, 2016 on the school's website, available here: http://pwcs.edu/.

[57] Jeff Martin, *Ads appear on school websites,* USAToday.com (March 18, 2010). Available at: http://usatoday30.usatoday.com/news/education/2010-03-17-school-website-ads_N.htm.

[58] *Id.*

[59] Children's Internet Protection Act [Pub. L. No. 106-554 and 47 USC 254(h)]. For a summary of CIPA's requirements, *see: http://www.roe35.k12.il.us/Downloads/Guidelines_for_CIPA_Compliance.pdf.*

[60] 15 U.S.C. §§ 6501–6506 (Pub.L. 105–277, 112 Stat. 2681-728, enacted October 21, 1998).

COPPA's requirements.[61] Whatever the school decides, legal counsel will be an important part of ensuring effective and legally-defensible implementation of the school's plans to allow website advertising.

Licensing and Profiting From the School Brand

One of the most important assets a school has is its name. The school's name, brand, logo, mascot and image are all intellectual property that should be protected, and the school can use these assets to generate revenue (or at least protect them from generating revenue for the wrong people). Schools should have careful policies on protecting employee work product and establishing clear expectations about what intellectual property the school owns. Schools should also review their contracts and collective bargaining agreements to ascertain if any rights are expressly being given with regards to intellectual property.

Attys. Carol Simpson and Colleen Uhlenkamp put together an excellent guide for school attorneys for their 2015 Council of School Attorneys School Law Practice Seminar 2015 presentation entitled "*Copyright and Trademark Law for the School Lawyer: Common Scenarios and Practical Solutions*."[62] In that document, Attys. Simpson and Uhlenkamp address the important issue of the legal importance of contract language for all employees that protects and reserves the rights to all intellectual property created by the employees. This is particularly true for patent law protection, since the "work-for-hire" concept does not apply in the same manner in patent law.[63] This becomes important for schools who have tasked their technology staff with designing software for the school's use. In the event that the school may have an opportunity to earn revenue from that type of a program by licensing it to another school, etc., the employee may have a claim to a portion of the profit regardless of whether he or she continues to work with the school. Thus, it is important to straighten out intellectual property rights at the contract phase of the employment relationship, so that there are no unexpected surprises. Note, however, that if intellectual property rights are currently being transferred to employees through contract or standard practice, the change may have to be bargained if the employee is a member of a collective bargaining unit.

With respect to trademarking, Simpson and Uhlenkamp's presentation paper emphasized how important it is for schools to check their own logos, names and mascots against the existing

[61] Lesley Fair, *Testing, Testing: A Review Session on COPPA and Schools,* Federal Trade Commission (January 23, 2015). Available at: https://www.ftc.gov/news-events/blogs/business-blog/2015/01/testing-testing-review-session-coppa-schools.

[62] Available to COSA members at http://www.nsba.org/copyright-and-trademark-law-school-lawyer-cosa-slps-paper.

[63] For an excellent discussion of this issue, see Bradley Wright's article in the National Law Journal, *Intellectual Property: Employees May Not Own Key Patents* (December 18, 2000), available at http://bannerwitcoff.com/_docs/library/articles/keypatents.pdf.

trademarks to ensure that they are not already taken.[64] This type of review and protection is essential before attempting to use them in the marketplace. Additionally, schools should be diligent regarding improper use of their logos, names and mascots, particularly for purposes of fundraising or other financial gain.

Schools are becoming increasingly protective of their intellectual property rights with respect to logos, names and mascots. The legal counsel's office of the Nebo School District in Spanish Fork, Utah, does a tradename/trademark registration on all of its high school names, mascots and logos.[65] The Union Public Schools in Tulsa, Oklahoma, requires written permission prior to *any* use of school trademarks and trade names.[66] These protective practices are highly advisable for schools due to the increased exposure to the tradenames/marks on the internet as well as the commercial viability and potential for revenue-boosting.

Teacher Online Sales of Lesson Plans, Curriculums, and other Work-for-Hire Intellectual Property

There is an increasing market for lesson plans and curricular programming online, and many teachers are taking advantage of them by selling their plans online.[67] Schools may permit these types of transactions, or they have reasons to prohibit it. Most teachers, however, do not even realize that, through the legal theory of employee-work-product, they do not own the intellectual property rights to the lesson plans that they are selling. Conversely, "free" lesson plan sharing sites often come at a high price. In exchange for permission to use the sites, teachers sometimes relinquish rights to the documents that they share to the host company.[68] School policy should reserve all intellectual property rights on behalf of the school board and should specifically designate which individuals, within the school, have the authority to enter into contracts regarding intellectual property use. Further, schools should clearly mandate that no individual or group is permitted to profit from the intellectual property of the school without express permission from the board or specific designee.

[64] Carol Simpson, Esq. and Colleen Uhlenkamp, Esq., *Copyright and Trademark Law for the School Lawyer: Common Scenarios and Practical Solutions*, Council of School Attorneys (2015), Available to COSA members at http://www.nsba.org/copyright-and-trademark-law-school-lawyer-cosa-slps-paper.

[65] The author would like to thank Reed B. Park, Esq., for providing this information regarding the school's practices.

[66] See the District's Policy here: http://www.unionps.org/index.cfm?id=214#Logos.

[67] Rachel Lynette, *Earn $ for Classroom Materials: Teachers Pay Teachers and the DIY Economy,* Edutopia (January 7, 2014. Available at http://www.edutopia.org/blog/classroom-materials-teachers-pay-teachers-rachel-lynette.

[68] Stephen Sawchuk, *Lesson-Sharing Sites Raise Issues of Ownership, Use*, Education Week (September 30, 2015).

Use of Intellectual Property as Means of District Control Over Foundation, Booster Club, Crowdfunding, and Other 3rd-Party Initiatives

School Districts do not inherently have control over independent 3rd-party groups such as foundations and/or booster clubs (*see "Donations and Charitable Giving" section, below*). The only way that the school can restrict the actions of those types of groups, if they are formed as independent organizations, is to restrict the use of the district's name, title, logo, mascot, and other types of intellectual property. Since these types of groups are generally formed specifically to raise funds for the school, their function is extremely limited if they are unable to utilize the district's name, logo, or mascot in their fundraising efforts. Thus, school board policies governing and restricting the actions of these types of groups are really akin to specific licensing agreements. *'If you agree to follow this set of rules, we will allow you to use the district's name, logo and/or mascot in your fundraising efforts.'*

Many schools are reticent to be too overreaching in their establishment of requirements for partnering booster groups and foundations, and this is understandable, given the fact that the sole purpose of such groups is to give back to the schools. However, schools should be wary of having their name dragged through the mud in the media where misconduct occurs in a booster group or foundation that is bearing the school's name. Thus, setting forth reasonable restrictions and minimum requirements for accounting practices, fundraising activities, use of school facilities, and compliance with applicable laws.[69]

Similar restrictions should be set for any individual seeking to raise funds or garner donations on behalf of the school using crowdfunding sites. As explained in more detail in the "Crowdfunding" section, below, school policy should also prohibit all raising of revenue using the school's name, logo, or other identifying marks, without prior approval.

Donations and Charitable Giving

Donations and charitable giving have always been a staple of post-secondary and private education. K-12 public education has not traditionally been involved with glossy alumni brochures, invitations to special functions, and establishment of alumni groups focused on continued giving. Public elementary and secondary schools have simply not been as active or motivated in the procurement of planned gifts. With school funding nearing critical lows, however, dedicated non-profit foundations have become increasingly important, and schools are becoming better-equipped to solicit and accept financial gifts.

[69] A common example of applicable laws to fundraising efforts are the gaming laws that vary from state-to-state.

Part of that preparedness, however, means having the proper procedures in place for evaluating and analyzing such gifts. In the current climate of public school budget and funding crises, it is difficult to imagine turning down a monetary gift to the school. In 1997, however, the District administration of the San Francisco Unified Public School District declined to accept an award of $5,000 that was given to the high school newspaper by a charitable foundation. The reason? The award was the Hugh M. Hefner First Amendment Award, issued by the Playboy Foundation.[70] At that time, the Playboy Foundation had already been established for more than 30 years as a tax-exempt, charitable organization, giving upwards of $20 million annually to support a variety of causes focusing on the areas of reproductive health and rights, human sexuality, civil rights and civil liberties, and First Amendment rights.[71] The award in the San Francisco case was issued to the students in recognition of the fact that the paper had stood up to the school's principal and other leadership by reporting on controversial issues such as school administrator replacements and perks for student athletes.

In their letter signed by the District's Executive Director and two Associate Superintendents, the administrators rejected the gift, stating:

> We believe that to accept an award, no matter how well-intentioned, from a foundation which represents an adult magazine and adult products that are 1) inappropriate for minors, and 2) illegal to sell to minors, would represent a tacit endorsement for those products and therefore contrary to the mission of our school.[72]

In its response, the Foundation informed the school that the award was, in fact, solely in recognition of the school's newspaper advisor, whom they believed had overcome unlawful censorship. The award plaque read:

> In the face of daunting odds – including opposition from the school administration – [she] understood and enshrined the value of the First Amendment and the pursuit of journalistic truth in her students.[73]

Ignoring the administration's decision that the award should not be accepted, the newspaper advisor attended the awards ceremony at her own cost (the District refused to pay) and accepted the award on the school's behalf.[74] "There is nothing flaky about the reward or the recipients,"

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[70] New York Times, *National News Briefs; High School Refuses $5,000 Playboy Award* (1997, October 21), *available at:* http://www.nytimes.com/1997/09/22/us/national-news-briefs-high-school-refuses-5000-playboy-award.html

[71] Playboy Enterprises, *The Playboy Foundation* (2014). http://www.playboyenterprises.com/home/content.cfm?content=t_title_as_division&ArtTypeID=0007687D-BB6E-1C76-8FEA8304E50A010D&packet=FF3808D3-A129-F648-7FE2D1F85EF0DDFA&MmenuFlag=foundation&viewMe=1.

[72] Student Press Law Center, *Advisor accepts Playboy award* (1997, December 1). *Retrieved from* http://www.splc.org/article/1997/12/advisor-accepts-playboy-award?id=204&edition=9

[73] Student Press Law Center, *Advisor accepts Playboy award*. *Id.*

[74] *Id.*

said the adviser, Katherine Swan. "Playboy does get some fine articles in it. It's a mixed magazine."[75]

The situation is complex - plagued with individual and combined weighty issues of First Amendment protections for student-run District publications, employment protections for faculty claiming to be trying to defend such First Amendment rights, and the disciplinary authority of the administrators in the face of the potential insubordination of the advisor, who pointedly and decisively went against their formal decision that the District would not be accepting the award. Knowing only the scattered bits and pieces of the facts that the various media outlets present, one can only imagine the threats of lawsuits, intervention of the teachers' union, and back-room negotiations that went on to finally resolve all of the unpleasantness.[76] The questions that the San Francisco Unified administrators, and all administrators who watched this story unfold, must have been asking are "what happened?" and "was there anything that could have been done to avoid this situation?" While it seems that there was a panoply of triggers and exacerbations, answer to the latter question is certainly yes. Much of the situation could have been avoided with a little legally-defensible policy drafting. As all educators and attorneys well know, hindsight is 20/20, but sometimes a little Monday morning quarterbacking can make a very positive difference, if lessons can be learned from other people's messes.

At the heart of the issue lies one clear fact: had the District adopted a Policy setting forth clear criteria for the acceptance of gifts, donations and monetary awards prior to the censorship accusations, there would have been far less drama. The administrators' reasoning for not wanting to accept the Playboy donation on behalf of the school was sound in and of itself. Had there already been clearly-defined guidelines and rules for acceptance of gifts, the decision would have been simple and irrefutable, and there would have been no question as to whether the decision was being made in retaliation for the advisor's past scuffles with the school leadership. However, it appeared fairly clear that there was no definitive guidance in the form of Board Policy and administrative regulations, and the administrators surely felt as if they were wading in the mire of the First Amendment issues in the case, given the prior history of allegations of censorship and issuance of the award to the advisor. Regardless of whether the decision that they made was reasonable (and it is difficult to imagine that the general population would be in disagreement with their general premise that an award from *Playboy* is probably one that the District shouldn't accept), the decision was made ***reactively*** in the middle of a hot-button censorship debate, which very likely inflamed all of the other issues.

So what should have been done? The answer is simple. The issue is not an unforeseeable one… while it may not happen often, schools are going to receive gifts in the form of charitable donations, monetary awards from 3rd parties, and planned gifts. Schools need to address the rules, restrictions and guidelines regarding the acceptance of those gifts ***proactively***. Take, for example, even the very general language set forth in the Denver Public Schools Board Policy regarding "Public Gifts / Donations to Schools."

> The District is receptive to and welcomes outside financial support by means of gifts and donations to aid in the delivery, maintenance,

[75] New York Times, *National News Briefs; High School Refuses $5,000 Playboy Award, Id.*

[76] From the media reports, it appears that the newspaper advisor did not continue to work at that particular school for much longer, although the facts are not altogether clear about when and why she left and/or where she ended up.

> and improvement of the District's educational programs. Gifts and donations include contributions of cash or tangible personal property (e.g., equipment) and can be unconditional or conditional in nature. The District shall accept gifts and donations that align with the District's goals and priorities. The District shall not accept offers of gifts or donations that include conditions or demands that would jeopardize the ethical or practical operation of the District.[77]

In 2009, the Denver Public School Board issued detailed regulations to accompany the Public Gifts/Donations Policy.[78] Those regulations provided additional specificity, direction and clarity to the more general policy language, and they include several items that would have been helpful in the San Francisco case, including specification regarding who is authorized to accept gifts. They do not, however, contain any restrictions regarding the acceptability of the donor. While the absence of such language would not necessarily preclude the Denver schools from accepting a donation from Playboy, adding a common-sense restriction as to the suitability of the donor to the policy and/or administrative regulation would reinforce the school's decision, should they have faced the same situation.

Contrast this with the Greenwich Public Schools in Greenwich, Connecticut. Greenwich established procedures set forth the following criteria for acceptance of gifts:[79]

> [The gift being considered:]
> a. Will have a purpose consistent with those of the District.
> b. Will be offered by a donor acceptable to the District.
> c. Will not add to staff workload.
> d. Will not begin a program for which there is an assumption or expectation of funding from the District to continue the program once grant funds are exhausted.
> e. Will not bring undesirable or hidden costs to the District or the Town of Greenwich.
> f. Will place no restrictions on school programs.
> g. Will be consistent with the District educational standards for students.
> h. Will not imply endorsement of any business or product.
> i. Will not conflict with any District policy, school code or public law.
> j. Will not create inequity between or among programs (i.e., Title IX) or schools' Compliance with Title IX may require as a

[77] **Denver County Public Schools, *Public Gifts / Donations to* Schools** (Adopted 1975, September 19; Last Revised 2015, December 17). Available at: http://www.boarddocs.com/co/dpsk12/Board.nsf/Public?open&id=policies

[78] **Denver Co. Public Schools, *Regulation re: Public Gifts/Donations and Grants*** (Adopted 2009, June 18; Last Revised 2015, December 17). Available at: http://www.boarddocs.com/co/dpsk12/Board.nsf/Public?open&id=policies

[79] **Greenwich Public Schools, *Procedure E-020.3 – Gifts and Grants*** (Revised 2008) *also found at* *http://www.greenwichschools.org/uploaded/district/Board_of_Education/procedures/E0203GiftGrants.pdf*

condition of accepting a donation that a percentage (cash, value of donated property, value of donated services) be donated to a Title IX equity fund established for this purpose. This condition, if required, will be noted on the donation form.

k. Will be consistent with District procedures and other legal requirements regarding the hiring and compensation of any and all employees (part-time, temporary, permanent) whose services are to be paid for through gifts or grants.[80]

These procedures do set clear expectations that both the purpose of the gift and the acceptability of the donor are factors in the school's acceptance. It also contains safeguards that provide enhanced legal protection for the school and administration. The Greenwich procedures establish restrictions and heightened approval processes for large donations, and set limitations on a donor's ability to dictate with finality where the money must go. They also establish the concept of a "gift cap" – a monetary amount for gifts under which the administration may approve gifts and over which Board approval is required. In the Greenwich procedures, the gift cap amount is set by the District administration annually. For the protection of both the boards and the administrators, schools should consider establishing a policy that requires the administration to make a *recommendation* for such cap that must be then either approved or changed by the Board. Ultimately, the cap simply is a safeguard mechanism which red-flags potential heightened risk and ensures more careful consideration. Involving the Board in the risk-assessment process when the financial stakes get high can add an extra level of safeguards. Due to concerns regarding legal liability, schools should have their policies carefully reviewed and/or crafted by their attorneys to reduce potential liability and provide safeguards that protect the school and its employees.

Gifts, Donations, and Title IX Compliance

In the current culture of litigation and increased regulatory enforcement, it is imperative that schools ensure that funds coming in through charitable giving will satisfy all requisite legal requirements and not cause potential liability for the schools. A $50,000 donation is certainly very appealing to a cash-strapped public school, but that $50,000 donation, if not carefully vetted and accepted in a manner consistent with the District's responsibilities and legal obligations, it could easily result in a lawsuit that could be worth over $100,000 in litigation costs, fees and/or penalties for non-compliance.

The Greenwich schools have a very detailed and protective "Gifts and Grants" procedure that specifically addresses Title IX issues as well as documentation of receipt of gifts for federal tax purposes.[81] Title IX of the Education Amendments of 1972 (Title IX) prohibits sex-based discrimination in all public school K-12 programs and activities.[82] Under the District's procedures, with any gift, the District is required to set funds aside in a specific "Title IX equity fund" where

[80] *Id.*

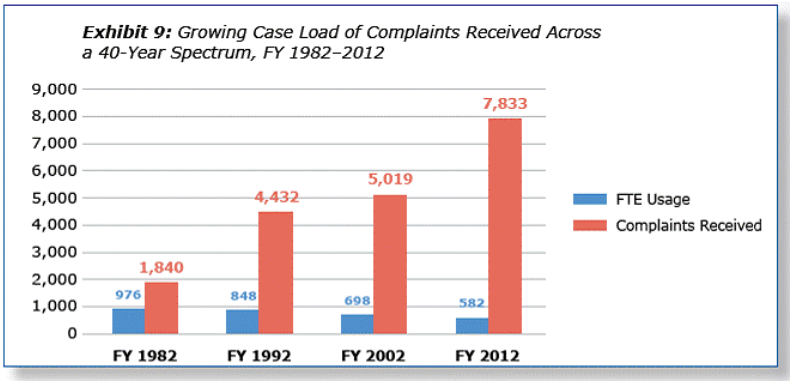
[81] **Greenwich Public Schools, *Procedure E-020.3 – Gifts and Grants***, *id.*

[82] 20 U.S.C. §§ 1681–1688. The Department of Justice shares enforcement authority over Title IX with OCR. The Department of Education's Title IX regulations, 34 C.F.R. Part 106, are available at http://www.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html.

a particular gift would result in a violation of the equity requirements of Title IX. This language clearly establishes a safeguard whereby the District can effective control its legal compliance under Title IX. These provisions are extremely important when considering athletic booster club donations, due to the potential Title IX implications of donations or gifts earmarked for the athletic department, but Title IX applies to all aspects of the school, not just athletics.

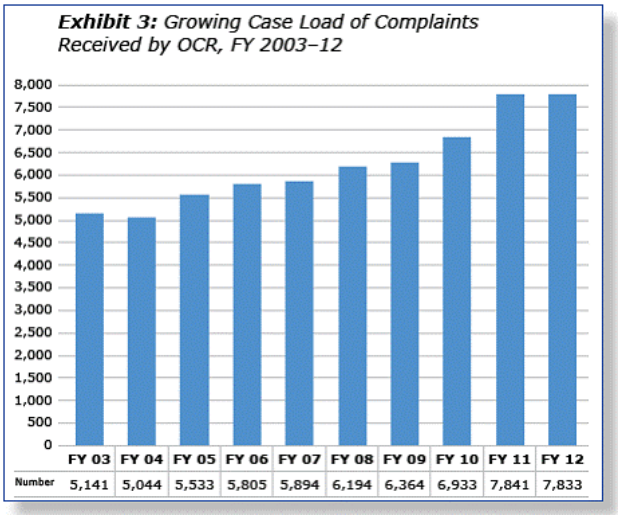
Proper review and oversight at the District level is key. Under Title IX regulations, schools must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX.[83] The Greenwich procedures state that "[d]onations of any type which have implications for Title IX compliance are also subject to review and sign-off by the Title IX coordinator." While this requirement does aid the school in ensuring compliance, schools may wish to include even stronger language. For instance, the procedures could more clearly state when funds would "have implications for Title IX compliance." The determination for Title IX implications is straightforward: compliance issues could potentially be involved anytime there would be gifts/donations that may affect boys and girls unequally. It is also recommended that schools use a strong mandate of obligations and authority when delegating tasks under such an important procedure. For instance, the Superintendent (or designee) should be obligated to make the determination as to what requires Title IX review, and the Title IX coordinator is obligated to review all of those items thus designated by the Superintendent. Or, in the alternative, in schools where it is feasible, all gifts and/or donations could require approval by the Title I coordinator to ensure legal compliance. While this is more burdensome on the Title I coordinator, it does provide a heightened level of legal-defensibility due to the fact that the decisions regarding whether a gift/donation has Title IX implications would be made by the individual who, presumably, has the greatest degree of training and knowledge of the Title IX requirements due to his/her position.

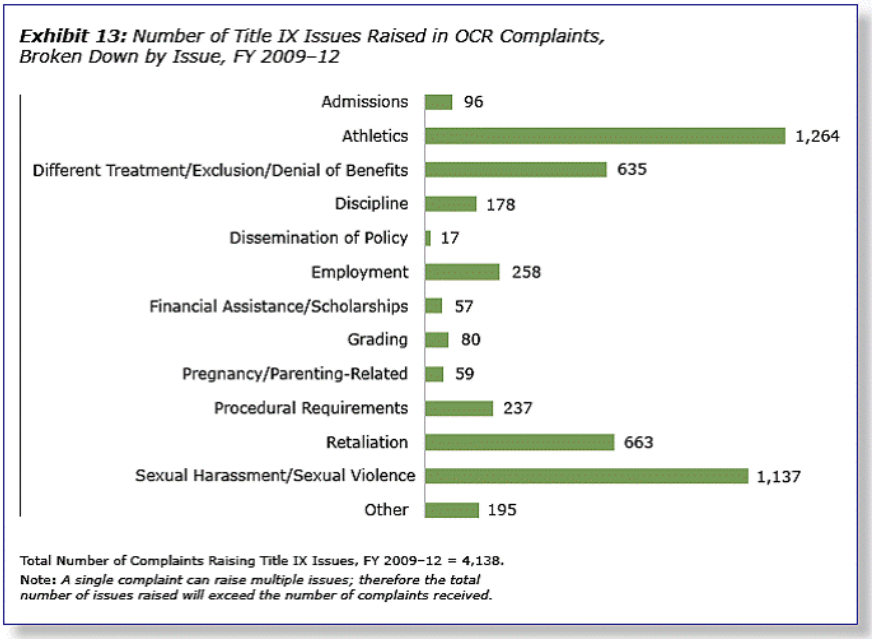
Title IX compliance, particularly in the area of athletics, is important, particularly because it is an area that is increasingly subject to regulatory enforcement by the Office of Civil Rights, as evidenced in the charts, below.[84]



[83] 34 C.F.R. § 106.8(a).

[84] All charts originally published in *Federal Policy and Guidance -- Helping to Ensure Equal Access To Education* (November 28, 2012), which can be found at: http://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf.





With regards to donations and charitable giving, it is important for schools to understand that <u>all</u> donations, regardless of the size or the donor, must comply with Title IX requirements. This includes booster clubs and other organizations with specific-donation purposes. The Office of Civil Rights (OCR) clearly establishes this expectation in a 1995 *Dear Colleague Letter.* In the situation described therein, OCR received an anonymous complaint alleging discrimination on the basis of sex with regard to the provision of educational opportunities for girls in physical education and the provision of equivalent services, benefits and opportunities in the interscholastic athletics programs at Rubidoux High School (RHS) in California.[85] OCR's investigation revealed that the

[85] OCR Dear Colleague Letter (February 7, 1995), which can be found at: http://www2.ed.gov/about/offices/list/ocr/letters/jurupa.html.

district was receiving funds from "booster clubs and other private sources." In that case, the boys' teams received at least $6850 and $9311, and girls' teams received at least $5150 and $5520. Notably, OCR pointed out that the District was unable to document how these funds were spent. OCR stated that the figures, themselves, suggested a disparity favoring boys in the provision of benefits and services, and the district was not able to provide supporting information to challenge that presumption of disparity.

The Greenwich policy and procedures set forth protocols that would protect against this type of disparity through the establishment of the Title I Equity Fund. Disparities favoring boys such as those described above do not, in and of themselves, constitute a violation of Title IX. In the case described in the OCR *Dear Colleague Letter*, if that district had been able to provide evidence of an off-setting benefit provided to girls and not to boys (from any funding source), there would have been no basis for a violation of Title IX. However, the district, in that instance, did not keep records on the expenditure of outside financial support and was not able to determine whether benefits to boy athletes from such sources are matched by some equivalent benefit to girls. The Greenwich policy protects against that specific type of circumstance.

The federal government has been increasingly aggressive with regards to regulatory enforcement, particularly in the area of Title IX and athletics. In one particular case in Michigan, a school district's acceptance of a gift from a booster club not only did not result in financial benefit, it ended up costing the district a significant amount of money.[86] As stated in the Huffington Post article, "there is no requirement to share fund-raised money, but the school system must provide parity in some form." Where a donor's actions and/or funds cause disparity, it is the school district that will be required to make the necessary adjustments, potentially at a high cost. In the Michigan case, a baseball booster club raised funds over a period of six years to change the configuration of the bleachers in the baseball field. The newly-replaced bleachers did not affect the availability of sports opportunities of the girls, since the bleachers enhanced spectator viewing, not play on the field, but similar fundraising and/or improvements were not made for the girls' softball team. Due to the disparity in spending between girls' and boys' teams, OCR required that the school tear down the bleachers, which it did at its own expense, since the booster club's money was spent on the purchase and installation of the bleachers. Had the district, in that case, set forth the same Title IX safeguards with respect to donor money that Greenwich has established, the school would likely have had a much better outcome and would not have been so costly to the district. However, as a result of the district's failure to carefully oversee and restrict the spending of the donors in that case, the school ended up paying an unnecessary, and likely significant, expense to bring the school back into Title IX compliance.

Booster Clubs

[86] Wendy N. Powell, Athletic *Boosters Beware: Government Orders Michigan School to Tear Down Fund-Raised Improvements*, Huffington Post (March 31, 2014). *Retrieved from* http://www.huffingtonpost.com/wendy-n-powell/athletic-boosters-beware-_b_5060862.html.

Most schools have booster clubs that assist in raising funds for student activities, particularly interscholastic athletics. As discussed above, schools must adopt policies and practices to ensure that booster club fundraising meets the requirements of Title IX. However, other concerns exist regarding permitting non-school entities to raise funds for schools and school activities. A quick internet search will produce hundreds of instances of misuse and alleged misuse of booster club funds, such as:

- In Mansfield, Ohio, three individuals were indicted for allegedly stealing more than $200,000 from a booster club scholarship fund.[87]
- In Campbell County, Tennessee, the president of the Campbell County High School Choral Booster Club, was indicted for the theft of at least $6,502 from the booster club.[88]
- In Winslow, Oregon, the Treasurer of the Winslow High School Wrestling Booster Club pled guilty to stealing nearly $20,000 in booster club funds.[89]

In 2013, a study was performed by the Pennsylvania School Boards Association (PSBA) in connection to pay-to-play fees (see pay-to-play discussion, below). The PSBA study found that Pennsylvania school districts had an average of eleven booster clubs per district and that at least one district had as many as twenty-five booster clubs operating within the district.[90] That study showed an alarming lack of accountability and/or school regulation in booster club activity:[91]

- 63% of districts required their booster clubs to have bylaws;
- 58% of booster clubs receive an annual audit;
- 51% of booster clubs submit financial report to the business manager;
- Only 11% of booster clubs require the treasurer to be bonded.

As discussed, above, in the section regarding "Use of Intellectual Property as Means of District Control Over Foundation, Booster Club, Crowdfunding, and Other 3rd-Party Initiatives," school attorneys should recommend at least a modicum of regulation of any party using the school's name, logo or mascot in fundraising efforts.

Foundations

[87] WKYC News, *Booster club president indicted in theft of club money*, wkyc.com (February 18, 2014). Available at: http://legacy.wkyc.com/story/news/local/akron-canton/2014/02/18/booster-club-president-indicted-in-theft-of-club-money/5584487/.

[88] *See* October 21, 2015 memo from TN Comptroller's office, available at: http://www.comptroller.tn.gov/repository/NR/20151021CampbellChoirBoosterClub.pdf.

[89] Matthew Hongoltz-Hetling, *Winslow woman to take plea deal in $20K booster club theft,* Portland Press Herald (June 5, 2014). Available here: http://www.pressherald.com/2014/06/05/woman-will-take-plea-deal-in-theft/.

[90] Education Research and Policy Center, *Pay-to-Play: November 2013 Update,* Pennsylvania School Boards Association (2013). Available here: https://www.psba.org/wp-content/uploads/2014/09/pay-to-play_update_2013.pdf.

[91] *Id.*

Education foundations are "privately operated, nonprofit organizations established to assist public schools" and who qualify as charitable organizations, "different from school districts, public institutions or local governments."[92] Foundations have their own board of directors, independent of the school district, and their own volunteer and/or paid staff. Most school foundations operate as "an independent entity, with no formal, legal relationship to the school district."[93] According to Bob New, founder and president of the Mid-Atlantic Consortium of Educational Foundations, "All the top fundraisers have one common thread: a paid executive director."[94]

Part of the overwhelming success of educational foundations is the availability of federal and state tax incentives for corporate donors. For instance, Pennsylvania has an Educational Improvement Tax Credit, which offers eligible businesses tax credits equal to 75 percent of their contribution to a maximum of $300,000 per taxable year. The tax credit jumps to 90 percent if a business commits to giving the same amount of money two years in a row. Companies can donate to scholarships, educational improvement or prekindergarten scholarship organizations. Florida has a matching grant incentive, which matches charitable giving to schools dollar-for-dollar.[95] All of these types of incentives make foundations very profitable for public schools.

Endowment Funds

The establishment of endowment funds is also a common and beneficial option for schools and/or the foundations that support them. Of course, where there are large endowments, there will inevitably be legal battles. The Derry Township School District was involved in an almost 2-year battle with the Milton S. Hershey fund (yes, an endowment started through the great founder of America's beloved chocolate), attempting to argue that the $1.8 *million dollars* it was drawing from the fund annually (a whopping 7.2% of the endowment's assets) was insufficient.[96] The court held that the District lacked legal standing to do so due to the fact that the Trust does not specifically mention Derry Township School District by name, rather, making general references to consideration for the fund to be used for public schools with no guarantee that the District would be a permanently-named recipient (or a specifically-named recipient at all).[97]Because of the myriad of legal obligations, fiduciary duties, and practical and legal consequences of establishing,

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[92] Clay, K., Hughes, K.S., Seely, J.G., Thayer A.N., *(1989). Public school foundations: Their organization and operation.* Arlington, VA: Educational Research Service.

[93] McCormick, D.H., Bauer, D.G., & Ferguson, D.E. (2001). *Creating foundations for American schools.* Gaithersburg, MA: Aspen Publishers.

[94] Sara K. Satullo, *Bethlehem Area Education Foundation searching for executive director,* (January 16, 2010). Available at: http://blog.lehighvalleylive.com/bethlehem_impact/print.html?entry=/2012/01/bethlehem_area_education_found.html.

[95] Education Foundations Florida, *Matching Grant Program* (2016). Available at: http://educationfoundationsfl.org/matching-grant-program/how-it-works#sthash.GWCu7xKm.dpuf.

[96] *See* Nick Malawskey, *Derry Township School District to file petition regarding M.S. Hershey Foundation ventures*, Penn Live (July 26, 2011), available at: http://www.pennlive.com/midstate/index.ssf/2011/07/derry_township_school_district_17.html and

[97] Matt Miller, *Judge finds Derry Township School District can't challenge funding decisions of Hershey trust*, Penn Live (June 8, 2012), available at: http://www.pennlive.com/midstate/index.ssf/2012/06/judge_finds_derry_township_sch.html.

maintaining and disbursing endowment funds, they should be carefully planned, created and implemented.[98]

Established in 1982, the Community Foundation of Lorain County (CFLC), Ohio, was the first community foundation in the country to hold endowments for local schools and has become a model for other communities throughout the U.S. and Europe.[99] The CFLC maintains endowment funds for a number of area school districts. The CFLC has published a helpful reference guide that details its relationship with the public schools and provides insight as to how such endowments can be established to assist public schools in their funding objectives.[100]

Crowdfunding

On May 7, 2015, Stephen Colbert announced that he would fund every existing grant request made by a South Carolina public school teacher on the education crowdfunding website DonorsChoose.org. He and two other nonprofit organizations pledged $800,000 to fund nearly 1,000 projects for over 800 teachers at 375 schools.[101] The trend of crowdfunding has hit the education community by storm, but schools should approach this new trend with caution and carefully consider whether policies are necessary now to regulate what teachers are doing online in the name of specific schools.

At the time of this writing, there were 25,197 open projects waiting to be funded on donorschoose.org, and that's just one of the hundreds of crowdfunding sites available. Crowdfunding can be broken down into two different types: those aimed at raising capital for a business venture and those aimed at raising funds for charitable donations. For the most part, the charitable donation aspect of crowdfunding is the type that is gaining great traction in public schools, both for legal and practical reasons, but, because it is important to understand the context and the vast practical and legal differences that exist among these three types of categories, a brief overview of both types is provided below.[102]

The business venture crowdfunding is generally undertaken by start-up businesses in lieu of getting a traditional business capital loan, with donors being promised – and expecting to get – some sort of return on their investment. It is a small-business financing model, of sorts. In this category of investment-based crowdfunding are two general types: pre-purchase/reward-based investing and peer-to-peer lending. With the pre-purchase/reward models, investors are promised

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[98] A dated but still very relevant and informative starting resource is Peter Loehr's Public Endowment Funds: Starting, Developing and Profiting (1992), available at: http://files.eric.ed.gov/fulltext/ED375476.pdf.

[99] *See* the Lorain Community Foundation's website at: http://www.peoplewhocare.org/.

[100] Lorain County Foundation, *School Endowment Reference Guide* (2014). Available at: http://www.peoplewhocare.org/images/School_materials/FinalSchoolFundsBooklet2014.pdf.

[101] Nathaniel Carey, *Stephen Colbert: South Carolina's $800,000 man,* (May 10, 2015). Available at: http://www.greenvilleonline.com/story/news/local/2015/05/10/stephen-colbert-funding-grant-requests-south-carolina-public-school-teachers-donorschoose-crowdfunding-site/70938100/.

[102] The summaries in this document are very broad. A good resource for understanding the differences among the available types of crowdfunding models, as well as the impact of securities law on the those involving financial returns on investments, is C. Steven Bradford's analysis: *Crowdfunding and the Federal Securities Laws* (October 7, 2011), which is made available by the SEC on their website: http://www.sec.gov/info/smallbus/acsec/bradford_crowdfunding.pdf.

a prototype of the product being funded and/or a specifically-designated perk or reward for investing (a CD and thank-you-note from a musical artist, etc.). These are, for all legal intents and purposes, contracts for the sale of goods and/or services, and they do not have the same securities law implications that the second type – the peer-to-peer lending model – has.

Legal Regulation of Securities-Based Crowdfunding

With the second type of business venture crowdfunding, the peer-to-peer lending model, investors are expecting to be repaid, often with a financial return on their investments or a share in the company.[103] Any lending or investment involving a financial return, including stock in the company, is regulated by securities law, which has historically been limited to accredited investors.[104] In March of 2015, the SEC issued new regulations that open the door to non-accredited investors wishing to participate and invest in online capital-raising mechanisms.[105] While it is possible that securities-based crowdfunding may be utilized by public schools in the future, research of current trends did not reveal any instances of its current use in public schools today. This is likely due to the fact that the raising of funds by local government entities, such as public schools, is heavily restricted by state laws that would preclude the use of securities-based crowdfunding as a capital-raising measure.

State Crowdfunding Legislation as Means to Raise Capital for Government Projects

While donor-based crowdfunding for civil projects is fairly common, a few states have explored the use of crowdfunding for the purposes of raising capital for public projects. Hawaii was the first state to propose government crowdfunding legislation. *Hawaii 3R's*[106] is a 501(c)(3) nonprofit organization dedicated to maintaining and repairing the state's public schools. Hawaii House Bill 2631 (2014)[107] would have required *Hawaii 3R's* to work with the state department of education to select two projects for a public crowdfunding pilot program designed to rebuild the schools. Under the Bill, the projects were required to be initiated by a member of the community and approved by the school that would ultimately receive the services. Hawaii would launch a crowdfunding campaign to fund the project, and the state of Hawaii would then donate up to $50,000 in matching funds. The bill also provided that 10% of the overall funds that would be raised would be donated to a school in Hawaii that qualifies for federal financial assistance. Although bill ultimately did not pass, it may have paved the way for other legislatures to engage in some out-of-the-box thinking about raising revenue for public schools in non-traditional ways.

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[103] C. Steven Bradford, *Crowdfunding and the Federal Securities Laws* (October 7, 2011). Available here: http://www.sec.gov/info/smallbus/acsec/bradford_crowdfunding.pdf.

[104] *Id.*

[105] See the SEC's summary and factsheet here: https://www.sec.gov/news/pressrelease/2015-249.html.

[106] See their website: http://hawaii3rs.com/. The 3 Rs stand for "Repair, Remodel and Restore Our Schools."

[107] See https://legiscan.com/HI/bill/HB2631/2014 for a full-text version of the bill.

In June of 2014, a bill was proposed in the New Jersey state legislature that would permit both donation-based and investment-based crowdfunding for government projects.[108] It would specifically permit several different types of government entities to raise funds for specific projects via crowdsourcing. While the bill has not advanced past the proposal phase, and would presumably be riddled with legal and practical issues if fully implemented, it provides an interesting look at how states are considering this type of funding as a mechanism for both accepting donor capital as well as utilizing investment-based crowdfunding for funding of projects.

Donation-Based Crowdfunding

Donation-based crowdfunding sites, such as the one DonorsChoose.org site referenced, above, are becoming increasingly popular with teachers and other individuals seeking to raise funds for their schools. Numerous articles, including articles found on reputable education-oriented websites,[109] extol the virtues of crowdfunding for public school educators, but no articles or guidance that alerted educators to the potential dangers and/or liability that schools may face with regards to these fundraising techniques could be found.

Important Potential Legal Issues

A review of some of the posts from educators on DonorsChoose.org[110] revealed some significant legal issues within the teacher posts themselves, including potential FERPA violations and liability under the Individuals with Disabilities Education Act (IDEA).[111] Regulation by schools of individual teacher postings on crowdfunding sites is a bare-minimum essential to prevent some of the issues described, below.[112]

In one instance, a teacher in a SC public school describes her 7-student classroom in detail, explaining that 6 are boys, and 5 are nonverbal. She posts a picture of some of her special needs students. While photographs of students may be considered to be Directory Information under the Family Educational Rights and Privacy Act (FERPA),[113] posting a picture and referring to the pictured students by their specific disabilities (in this case, autism), is likely a FERPA violation. While it is possible that the teacher obtained signed releases from the students' parents to publicly

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[108] NJ A3378. The bill can be viewed here: https://legiscan.com/NJ/bill/A3378/2014.

[109] *See* EducationWorld.com, *Raise Money With Crowdfunding: Top 9 Tips for Schools* (2014). Available at: http://www.educationworld.com/a_admin/crowdfunding-fundraising-schools-tips-best-practices.shtml#sthash.nLa420PV.dpuf. *See also* Edutopia's guide for teachers, *Raise Money for Your School Using Crowdfunding,* available at: http://www.edutopia.org/crowdfunding-fundraising-resource-guide.

[110] Note: The author selected this particular site due to its popularity among teachers and its recent media attention. The site was also selected due to its school-friendly policies and practices. The issues raised regarding teacher posts on this site reflect a need for teacher education and specific school policies regulating teacher use of crowdfunding and should not be construed as being critical of this important and beneficial education funding tool.

[111] 20 USC §1400 et seq., 34 CFR Part 300.

[112] Due to the legally-sensitive nature of the examples in the section below, the author, while describing examples of accurate DonorsChoose.org listings, at the time of the drafting of this document, has not provided specific citations or references for this section.

[113] 20 U.S.C. § 1232g and the FERPA regulations are found at 34 CFR Part 99. *See* the U.S. Department of Education's website for the full text of the law as well as helpful resources. Available at: http://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html.

release this specific information on the internet, which would allow the teacher to publicly disclose it, there is no indication that such action was taken.

In the same post, the teacher highlights the importance of the iPads that the teacher is requesting for her students' communication needs, indicating that the students' failure to communicate without the requested iPads "has led to some discipline issues." Both the fundamental need for the devices as assistive technology to properly educate the students, as well as the fact that the students are being disciplined for conduct related to their lack of communication skills are potentially significant IDEA issues for which the district in question could be held liable.

Another teacher in a California school district specifically states that the lack of materials such as puzzles, math manipulatives and fine motor materials has prevented her students from achieving their math IEP goals. She indicates that the receipt of the requested materials will "assist in implementing their IEP goals and ensuring that their goals are being met and achieved." As with the above example, under the IDEA, if such items are necessary for a student to meet his or her IEP goals, then the district is arguably required to provide those items pursuant to the IDEA and can be held liable for not doing so regardless of availability of funds.

Yet another teacher describes her 13-student classroom, in which all of her students have Autism with varying degrees of functional skills. She states: "Because of their inability to care for themselves, our classroom becomes filthy and germ-ridden by the end of the day. We need cleaning supplies and health supplies like tissues and hand sanitizer to help keep our students healthy." Once again, this entry, describing its "filthy" and "germ-ridden" special education classroom, describes circumstances that may be viewed as discriminatory and/or prohibited under the IDEA.

The entries, themselves, may be clearly admitting liability under the IDEA. Another California teacher, in her plea for $403 worth of puzzles, fine motor activities, and math manipulatives "to help the them achieve their IEP goals," states the following: "*Unfortunately the special education program at the school district in which I currently work for [sic] is not very supportive in making sure that the children have the materials that they need to ensure that they are successful students.*" The entry clearly indicates her name, the grade that she teaches, and the name of the elementary school at which she teaches and provides a link to the school's website.

Schools need to be aware that crowdfunding entries may be potentially in violation of school rules and/or policies, as well. In one entry, a teacher was asking for $1,769 for food-based positive behavior incentives. It stated that "[m]y students need snacks like juice, lollipops, hot chocolate and cookies to help promote and maintain good behavior." Among other things, the teacher was specifically asking for 360 bags of Frito Lay variety packs of chips, 240 individual bags of Keebler Fudge Stripe mini cookies, 1,200 dum-dums lollipops, 216 packs of Grandma's cookies, 1,200 packages of Sour Patch Kids, 600 packets of hot chocolate, six 27-oz. bags of "Chewy Favorites Candy Mix," a jar containing 1,445 lollipops, and 60 Lindt chocolate truffles. This entry prompted a review of the school's wellness policy, which stated:

> The primary goal of nutrition education is to influence students' eating habits. The district will integrate nutrition education into classrooms as often as possible by using the Health In Action: A Strategic Implementation Guide, which is a set of lesson plans and activities

> provided by the Mississippi Department of Education, Office of Health Schools.
> …
> The district will also establish guidelines for foods that available during the school day with the objective of promoting student health and reducing obesity in children.
> …
> One of the board's objectives is to educate students and parents about food consumption behavior to influence healthier choices. The board is committed to offer solutions to provide the healthiest choices available on school campuses during the school day, at after-school programs, and extracurricular activities to meet its wellness goals.[114]

In summary, while many of the entries posted on the DonorsChoose.org site posed little-to-no legal liability, there were an alarming number of entries that did pose some potentially-significant issues, including a number of potential FERPA issues related to teacher-posted photographs combined with specific written information in the posts about the class, descriptions of would could legally be considered to be potential IDEA violations, and violations of specific district policies. Other posts, while they did not pose any particular legal liability, painted their schools and/or districts in a very negative light when asking for funds.

Safeguards for Schools Regarding Donation-Based Crowdfunding on Behalf of Schools by School Employees

Most teacher crowdfunding posts are designed to raise funds under the name of a specific school. As discussed, above, schools should have careful regulations regarding who can raise funds on behalf of a school and what procedures and protections should be put into place to protect the school in such instances. Teachers should be prohibited from using the school's name or any other identifying features unless the teacher is in full compliance with the procedures and/or protocols established by the school. Below are some recommendations for safeguards that should be put into place to protect schools. These protocols are designed to assist schools in reducing potential liability caused by teacher crowdfunding posts.

- ### Require Administrative Approval of All Postings before They Are Published

Individuals wishing to raise funds for a particular school should be required to obtain written approval after providing pertinent details, such as the site on which the funds would be raised, a complete copy of the proposed listing, a copy of the school personnel's personal profile to be listed on the site. Approving administrators should carefully review the proposed posts to ensure that no potential legal liability, violation of state or federal laws, and/or violation of the school's policy and/or procedures exist. The proposed posts should also be reviewed to ensure that the posts do not paint the school, the district, or any of its employees or students in a negative light. Ideally, school regulations/procedures should prohibit all posting of student images on the site, limiting pictures to that of the classroom, teacher and/or photos of students where the students

[114] Jackson Public Schools, Jackson, Mississippi wellness policy. Available here: http://www.jackson.k12.ms.us/board/policy_approved/c_school_administration/chaa.pdf.

are not identifiable (i.e., their hands, backs of heads, etc.). Reviewing administrators should have the authority to deny permission for a teacher to crowdfund on behalf of the school and/or the teacher's individual classroom where potential issues or violations are present. Where a reviewing administrator spots an issue that may have legal implications, legal counsel should be consulted.

- ### Only Permit Crowdfunding on Sites from an Approved Site List that Send Proceeds and/or Items Directly to the Schools, NOT the Individual Employee

Several education-based crowdfunding sites already have safeguards in place to prevent misuse of funds and/or misappropriation of materials.[115] Funds raised and/or items purchased should go directly from the crowdfunding site to the school being served. Schools should require that funds and/or items be delivered directly to the school administrator. Many crowdfunding sites are not specific to schools and do not include this safeguard, but there are some crowdfunding sites, including DonorsChoose.org, that are tailored specifically to schools and that have this straight-to-the-school delivery system that may minimize misuse. If they wish to permit crowdfunding by teachers, schools should carefully consider all of the available sites and approve only those that provide the safeguards deemed most appropriate by the school.

- ### Ensure that Proceeds / Items Obtained through Crowdfunding Fulfill Stated Purpose

Funds raised and/or items purchased via crowdfunding must be used for their designated purpose. As such, schools should have safety mechanisms in place to ensure that the funds/materials are being used as described. Schools should also make clear, via written policy or procedure, that all funds and/or materials are property of the school and shall remain with the school in the event that the teacher terminates his or her employment with the school.

In summary, crowdfunding is a relatively new source of revenue streaming that is being widely used by the education community. School attorneys should advise that their clients take reasonable measures to regulate the crowdfunding that is currently being done in the name of the schools and should monitor this fast-moving trend for the onslaught of legal issues, legislation and best practices that will inevitably follow.

Facilities Use / Lease of District Property

Many schools are finding creative ways to use their property, itself, as a revenue source. For instance, many schools are permitting and supporting the lease of the school for before and

[115] There are many different types of crowdfunding sites available, and an internet search will provide a variety of guides for educators. Edutopia.org has a fairly comprehensive guide that is specific to education. It is available here: http://www.edutopia.org/blog/film-fest-online-fundraising-crowdfunding-resources.

after care programs. These programs benefit both the schools, financially, and the public, but such agreements must be entered into with great care and planning. Prior to any such use, schools should check with legal counsel to ensure that state law does not restrict them from utilizing resources in a particular manner or prohibit the for-profit lease of property and/or facilities altogether. Below are a few of the basic legal considerations schools must make when determining whether leasing of facilities is a worthwhile option:

- Schools, via both board policy and individual contracts, should ensure that there is a clear separation between the school and the leasing entity for purposes of liability protection. It is important not only for the entities to have true legal separation, but also that the separation is made clear to the parents and community, such that there are no misunderstandings or difficult expectations.
- The school should ensure that both it and the leasing entity has sufficient insurance coverage. This can required via contract, policy or both.
- Schools will need to be very careful how they structure the leasing options, as opening the facilities up to lease could potentially constitute an opening of the forum for First Amendment purposes.
- Where property may be used at times when students are on school property, the school should consider whether background checks are legally required or simply prudent. Part of such consideration should include a determination as to who is going to be responsible for getting them, funding them, and/or maintaining them.

Lease of Property for Technology Initiatives

Cell Towers

With the popularity of cellular technology and the ever-increasing competition by the cellular companies to have the most comprehensive network possible, schools are now commonly being approached with offers of cell tower land-lease packages. Not all companies and offers are equal, though. It is widely reported that offers of compensation for lease of land for cell towers can vary significantly, and that schools may need to drive a hard bargain in order to secure a good lease price. The Chattanooga Free Press, in a June 2014 article, reported that there were, at that time, 190,000 cell phone towers with an average yearly lease rate of $45,000.[116] However, the article stressed the important fact that negotiation of a cell tower lease is crucial. Hugh Odom, a Nashville attorney cited in the article, stated that "90 to 95 percent of the time, individuals and municipalities don't ask for enough compensation."[117] Location is also crucial when determining

[116] http://www.timesfreepress.com/news/local/story/2014/jun/04/cell-towers-booming-are-private-land-owners-being-/142154/.
[117] *Id.*

the value of the lease.[118] Such leases can be a very profitable source of income for a suffering school, though. [119]

A thorough examination of the lease documentation is essential, though, because federal legal compliance for cellular towers is extremely burdensome. A new tower construction requires:

- approval from the state or local governing authority for the proposed site;
- compliance with the National Environmental Policy Act (NEPA);
- compliance with the National Historic Preservation Act (NHPA); and may require
- notification to the Federal Aviation Administration (FAA); and
- Antenna Structure Registration (ASR) with the FCC.[120]

While the leasing companies are very likely to be familiar with all of the applicable rules and regulations, school attorneys should protect their clients by carefully reviewing the leases to ensure that the agreement places the burden of regulatory compliance on the company owning the cell tower and provides sufficient indemnification of the school in the event that proper protocols are not followed.

City-Wide Wireless Networking

Schools in urban areas may be able to derive additional income by taking advantage of a city-wide WMAN initiative. As described by the University of Missouri-Rolla's website on the issue,[121]

> Wireless metropolitan area networks (WMANs) enable users to establish wireless connections between multiple locations within a metropolitan area (for example, between multiple office buildings in a city or on a university campus), without the high cost of laying fiber or copper cabling and leasing lines. In addition, WMANs can serve as backups for wired networks, should the primary leased lines for wired networks become unavailable. WMANs use either radio waves or infrared light to transmit data. Broadband wireless access networks, which provide users with high-speed access to the Internet, are in increasing demand.

Numerous cities in the U.S. already have such systems in place. For instance, Allentown, PA, has a WMAN that provides city-wide radio and video surveillance in an effort to reduce crime in the city. Green City, WY, also has a city-wide WMAN that is used by first responders and law enforcement. The WMAN in San Jose, CA, is used to control the city's traffic lights, street lights and speed radar signs. San Francisco, CA, uses a WMAN to provide wireless for over 60 miles across the San Francisco Bay, and Washington State uses a WMAN to connect its entire ferry

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[118] *Id.*

[119] And don't worry - if the school or community is concerned regarding having an "ugly" tower placed on school property, never fear – architects have become adept at creating designs that fit their surroundings. Towers have taken the form of trees, flagpoles, and even church towers. (*Id.*)

[120] https://www.fcc.gov/general/tower-and-antenna-siting

[121] http://web.mst.edu/~mobildat/WMAN/index.html

system. Waterford Township, MI, uses its WMAN not only for first-responders, but also to control its water treatment facilities. Bellwood, IL, instituted its "Digital City" project to extend cost-effective and efficient wireless coverage over the entire city, and MetroNational, a billion-dollar real estate organization in Houston, TX, uses a MWAN to connect its three large office buildings, providing wireless hotspot coverage in all three buildings, over a freeway and throughout a nearby mall.[122]

While wireless networks are currently generally limited to densely-populated areas, coverage areas are increasingly on the rise, and urban schools may be approached by companies seeking to use their buildings to expand an urban wifi network. Regardless of whether the school is receiving income from these city-wide networks or merely find themselves in the middle of one, they should be aware of potential privacy-violation issues that are present with any wireless network. Attorneys whose schools are receiving revenue or other compensation by contracting to host MWAN technology should carefully review those agreements to ensure, once again, that the proper indemnification provisions are in place and that the districts will not incur any undue liability for simply hosting the equipment.

Brief Discussion of Other Types of Revenue Sources:

Childcare

Public schools are increasingly becoming involved in before-and-after care. Some host it within the schools, some contract with other providers, such as YMCAs, to host it in the provider's facilities, and still some opt for a "use of facilities" agreement that allows 3rd-party providers to provide childcare in the school buildings before and after school hours. In 2008, forty-six percent (46%) of U.S. public elementary schools had a fee-based after-school program.[123] Of the fee-based elementary after-school programs, the breakdown according to number of hours operated per week is as follows:[124]

- 23% - less than 15 hours per week
- 52% - 15-19 hours per week
- 25% - 20 or more hours per week

Only two percent (2%) of the schools that have fee-based after-school care programs provide transportation with those programs.[125]

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[122] http://www.proxim.com/products/knowledge-center/case-studies.

[123] IES National Center for Education Statistics, *After-School Programs in Public Elementary Schools* (February 2009), U.S. Dept. of Education. Available at: http://nces.ed.gov/pubs2009/2009043.pdf.

[124] *Id.*

[125] *Id.*

In 2008, ten percent (10%) of U.S. public elementary schools reported having a federally-funded 21st Century Community Learning Center (21st CCLC) program.[126] In 2014, there was much discussion in the legislature about cutting the 21st CCLC funding from the ESEA reauthorization. After several tense months of discussion, the legislature kept the funding in the new law.[127]

In the Tampa Bay area, the Hillsborough County Public Schools, which is comprised of 216 schools, has offered after-school programs since 1990.[128] Hillsborough offers fee-based as well as subsidized programs. Originally designed as childcare programs, Hillsborough has developed them into enrichment programs with activities and learning opportunities.[129] Hillsborough County Public Schools contract with local YMCAs to provide the facilities for the programs.[130]

Schools seeking to host or hosting after-school programs have a variety of options and considerations. The schools could run the programs on-site, they could contract with 3rd-parties (such as Hillsborough and the YMCA) to provide the programs at off-campus facilities, or they could contract with 3rd-party providers to host the programs in the school. Among the factors that schools should consider are:

- Insurance – is there coverage for the programs (especially fee-based)?
- Facilities – additional maintenance and/or grounds keeping staff may be necessary.
- Tort Claims Protection – for states with statutory governmental tort claims immunity, schools should check to make sure the immunity covers these functions, particularly the fee-based services.
- Use-of-Facilities – are the concerns regarding 3rd-party use of the facilities (if the school opts for 3rd-party programs on school grounds) considerations set forth in the "Facilities Use" section, above, being addressed?
- Clearances/Background Checks – are the employees and staff of the program properly vetted? If the program is off-site, do those not working with the school programs require clearances, as well?
- Separation of Funds – accounting and funds for fee-based services should be maintained separately from school resources.

Pouring Rights and Exclusivity Agreements

Many schools have what are known as "pouring rights" agreements, which are traditionally exclusive contracts with one vendor (such as Coke or Pepsi) for beverage services within the school and at after-school events, such as football games. Snack vendors also have similar

[126] *Id.*
[127] Every Student Succeeds Act, Section 4201. Pub.L. 114-95.
[128] Hillsborough County School District, *Background of HOST and Why Out of School,* http://www.sdhc.k12.fl.us/doc/679/background.
[129] *Id.*
[130] *Id.*

exclusivity contracts. While the scope of these services have been significantly curtailed by the U.S. Department of Agriculture's "Healthy Snacks" limitations,[131] exclusivity agreements or "pouring rights" contracts, remain a source of significant income to schools.

In an attempt to join the fight against childhood obesity, the Board of Directors of the Seattle Public Schools, in 2004, banned all pouring rights agreements as well as the vending machines that the agreements facilitated.[132] This was notably one of the most restrictive policy moves in the country with regards to restriction of vending machines in public schools.[133] The loss of the vending machines, however, had a substantial impact on the student activities groups throughout the school system, who were the primary recipients of the funds. Prior to the ban, the student activities groups received $214,000 in revenue to subsidize items such as athletic uniforms and transportation costs, support student clubs, school dances and the school's yearbook and newspaper. After the ban, the revenue fell to a mere $17,000.[134] In 2006, the school board promised to subsidize the funds, but it did not. The school was forced to resort to pay-to-play systems for some activities[135] (see, below, for a discussion of "pay-to-play" systems). Realizing that the ban went "perhaps a little too far,"[136] the school system reversed its policy in 2012.[137]

Most states continue to permit pouring rights agreements, but individual school districts are free to ban, restrict or regulate such agreements. For instance, the state of New York, which does permit "pouring rights" agreements, but has several state Education Department Commissioner Decisions discussing pouring rights contracts in New York public schools.[138] School attorneys should check the laws in their states both for regulations regarding exclusivity agreements as well as pouring rights agreements, specifically. Schools should be aware, however, that any such agreements must also comply with the USDA "healthy snacks" guidelines.[139] In addition, schools should be aware that if the USDA regulations regarding advertising in schools (discussed, above) are implemented, vending machine sales and traditional pouring rights contracts may be affected.

Pay-to-Play

[131] For a list of products currently approved by the USDA as meeting the "Healthy Snacks" standard, go to: https://www.healthiergeneration.org/live_healthier/eat_healthier/alliance_product_navigator/browse_products/?product_category_id=720.

[132] Brian M. Rosenthal, *School board may ease ban on junk food*, Seattle Times (December 11, 2011). Available at: http://www.seattletimes.com/seattle-news/school-board-may-ease-ban-on-junk-food/?prmid=4939.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *See* the Seattle Public Schools "Miscellaneous Contracts" policy, 6220SP.F, available at: http://www.seattleschools.org/UserFiles/Servers/Server_543/File/Migration/Departments/HR/6220SP.F.pdf?sessionid=d249654e54f9ae0807a5cf8a160886eb.

[138] *See* Decision No. 14489, available here: http://www.counsel.nysed.gov/Decisions/volume42/d14489; Decision No. 14804, available here: http://www.counsel.nysed.gov/Decisions/volume42/d14804; and Decision No. 14805, available here: http://www.counsel.nysed.gov/Decisions/volume42/d14805, among others.

[139] *See* http://www.fns.usda.gov/school-meals/regulations.

In 2010, the Pennsylvania School Boards Association (PSBA) performed a comprehensive study on pay-to-play trends in PA's public schools,[140] with updates to the report in 2012[141] and 2013.[142] The 2010 study found that, of 770 different respondents representing 48 U.S. states, 33.5% indicated that they have fees, and either have increased or would be increasing existing fees for the 2010-11 school year.[143] In the 2013 update, PSBA reported the following statistics:[144]

- 11% of PA school districts have reported having to cut an activity due to funding;
- 38% of PA school districts reported charging students fees for participation in interscholastic athletics (up from 13% in 2010);
- 22% have reported charging fees for non-athletic activities, including band and chorus;
- Most PA schools that charge for activities charge a single, annual fee;
- Basketball is the most commonly-reported athletic program to be cut.[145]

These statistics appear to be reflective of a national pay-to-play trend.[146]

While pay-to-play is a viable mechanism for offsetting some of the costs related to public school activities and to stave off further elimination of specific sports and/or activities, it does have its detractors.[147] Those who oppose pay-to-play systems argue that they unfairly limit the opportunities of socioeconomically-challenged students and minority students.[148] KidsPlayUSA is a Maryland-based foundation dedicated to subsidizing the cost of public school sports to make sports affordable for all students.[149] The organization aims to work with youth sports organizations (including public school sports programs), individual donors, and corporate sponsors to ensure a more equitably-funded system.[150] Public schools are challenged to offset costs and raise funding for sports programs through a variety of options, including pay-to-play, private foundations, booster clubs, and individual donors (see the "Donations and Charitable Giving" section, above, for a discussion regarding these sources of revenue).

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[140] Education Research and Policy Center, *Pay-to-Play: Fees for Participation in School Extracurricular Activities,* Pennsylvania School Boards Association (2010). Available here: https://www.psba.org/wp-content/uploads/2014/09/pay-to-play-August2010-revisedSept2010.pdf.

[141] 2012 update available here: https://www.psba.org/wp-content/uploads/2014/09/Pay-to-Play-update_05072012.pdf.

[142] 2013 update available here: https://www.psba.org/wp-content/uploads/2014/09/pay-to-play_update_2013.pdf.

[143] 2010 PSBA *Pay-to-Play* report.

[144] 2013 PSBA *Pay-to-Play* update.

[145] Neither the 2010 PSBA study nor the 2012 or 2013 updates indicated whether non-athletic programs were cut due to lack of funding.

[146] Ann Killion, Paying to play is the new normal for youth athletes, sfgate.com (October 18, 2013). Available at: http://www.sfgate.com/sports/article/Paying-to-play-is-new-normal-for-youth-athletes-4902034.php.

[147] Darryl Hill, *Fighting Against 'Pay-to-Play' Sports,* NationalJournal.com (January 31, 2014). Available at: http://www.nationaljournal.com/next-america/newsdesk/fighting-against-pay-play-sports.

[148] *Id.*

[149] *See the KidsPlayUSA website at: http://kidsplayusafoundation.org/the-challenge.*

[150] *See http://kidsplayusafoundation.org/game-plan-focus.*

District-Sponsored Cyber-Options as Alternatives to Cyber Charters

In June of 2010, the Michigan Department of Education compiled a summary of states with full-time, statewide, online schools.[151] This chart summary shows that the majority of states have at least one statewide online school wherein the state funding leaves the student's district of residence and follows the student to the applicable online school. Virtual schools typically have a lower per-pupil expenditure rate than traditional brick-and-mortar schools,[152] but few states compensate for that difference. Thus, many school districts are turning to cyber-option versions of their own curriculums to keep students enrolled. In Pennsylvania, schools can save up to $4,000 per student by opening their own cyber-school options.[153] Indeed, cyber-learning businesses have sprouted up with the goal of helping schools retain students in cyber-options who might otherwise attend a statewide virtual charter school.[154]

Cyber programming in public schools does not have to be exclusively online. Hybrid programs, such as the Denver Public Schools' "Click and Brick" program,[155] offer online programming, which can be completed on or off campus, for some subjects and allow students to participate in the general learning environment during other portions of their schooling. Some market-savvy schools have not only developed successful cyber-options within their public schools, but have also worked to develop marketing platforms on their district websites to garner attention for their online and/or hybrid programs.

New Innovations in Cyber Revenue Streaming

The International Christian High School (ICHS) in Philadelphia, PA,[156] has contracted with a provider, Scholars' Promise International (SPI),[157] to create cyber version of its curriculum which SPI then markets to students across the globe. At a tuition rate of $5,000 per international student, the program garners much-needed revenue for the school.[158] While ICHS is a private school, it is likely only a matter of time before interest in this type of program is generated in the financially-strapped public school market. There are many legal issues to consider with regards to the implementation of such a project, including intellectual property issues with regards to the curriculum, whether state laws may restrict or prohibit the practice, and legal-compliance issues

[151] This resource is available publically at: http://www.doe.mass.edu/boe/docs/FY2010/0610/item4_FTvirtualschools.pdf.

[152] *See* Battaglino, Haldeman, and Laurans, *Creating a Sound Policy for Digital Learning,* Thomas B. Fordham Institute (2010/2011). Available at: http://www.edexcellencemedia.net/publications/2012/20120110-the-costs-of-online-learning/20120110-the-costs-of-online-learning.pdf. This resource estimates the cost, per pupil, of a brick-and-mortar education to be $10,000 while the cost of a cyber-education, per student, is $6,400.

[153] Margie Peterson, *2 more plan cyber school programs,* Morning Call (June 1, 2010). Available at: http://articles.mcall.com/2010-06-01/news/all-mc-lehigh-valley-cyber-school.7284765jun01_1_cyber-charter-cyber-students-cyber-school.

[154] See Apex Learning's case study of White River Valley Schools in Indiana, here: http://www.apexlearning.com/documents/Case_Study_White_River.pdf.

[155] *See* http://online.dpsk12.org/about-3/6077-2/.

[156] International Christian High School, http://www.ichsphila.org/.

[157] Scholars' Promise International, http://www.scholarspromise.net/about.html.

[158] *See* http://www.scholarspromise.net/tuition-and-fees.html.

with laws such as FERPA, CIPA, and COPPA. This type of program, however, could provide some much-needed financial relief for schools.

Proceed with Caution: Novel Legal Issues Abound

Schools seeking to create a cyber-option should proceed with caution and should obtain the advice of their legal counsel. There are many different laws that apply to public schools that would likewise apply to their cyber-options. Simple mandates, such as mandatory attendance laws, become tricky when applying them to a cyber-option. How is attendance measured? What is a "full day" in cyber-school? Which mandates can be contracted out to 3rd-party online service providers, and which cannot be transferred?

Special Concerns Regarding Cyber-Options and Students with Special Needs

Cyber-options for public school districts can become challenging with regards to special needs students. Schools must walk a fine line between the true provision of FAPE and non-discrimination. What is the "least restrictive environment" when it comes to a school that offers both a cyber and traditional brick-and-mortar option? Where a parent wishes to have a student attend a cyber option, but the IEP team determines that the brick-and-mortar option is more appropriate, which option should the school choose? Is the school obligated to first try to create an appropriate cyber program or hybrid program for the child to avoid a disability discrimination lawsuit? These questions have yet to be answered, but as more schools embrace the cyber-option as a way to recoup increasingly needed costs, the caselaw will surely follow.

Conclusion

There is certainly no shortage of viable options for public schools that are willing to get creative. School attorneys will be crucial throughout the process, assisting with liability analyses, development of legally-defensible policies and procedures, and providing ongoing consultation to avoid significant legal issues. While it is impossible to keep up with all of the latest trends, school law attorneys should keep abreast of common non-traditional, new and potential sources of revenue for their clients and assist them in making legally-sound decisions regarding supplemental revenue streams.

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