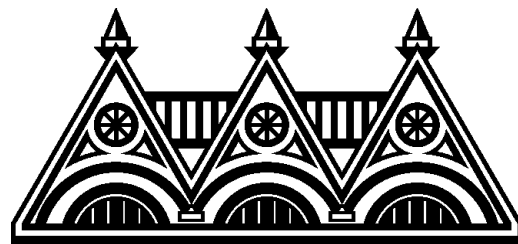


OSBA Capital Conference School Law Workshop

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Creative Revenue Sources for Public Schools

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A. Athletic Facilities: Boosters and Capital Campaigns

1. Background and Benefits

Artificial turf and improvements to athletic facilities have become a casualty in today's highly politicized era of scarce resources. It is rare to see such facilities overtly represented in bond issue or permanent improvement levy campaigns. These materials examine financing options, including booster gifts and capital campaigns with naming rights and pledge programs.

2. Boosters

There are many legal issues inherent in gifts of facilities to school districts, whether the gift is from a booster group affiliated with the school district, a community foundation, or specific bequest.

a. Common Fact Pattern

The common fact pattern for gifts is as follows:

- i. board of education declines to fund athletic facilities or improvements thereto;
- ii. school-affiliated group ("boosters") proposes to fund and/or construct gift;
- iii. boosters do not have the resources to complete gift at inception;
- iv. boosters intend to raise money through fundraising activities and in-kind donations of labor and materials, hiring skilled trades only when necessary;
- v. boosters fail to raise sufficient funds and school district tapped to fund remainder; and
- vi. gift becomes sole property of school district once completed.

b. Legal Issues

i. Nature of Boosters

Knowing the booster membership and leadership is helpful in ensuring a successful gift.

It is important to know the legal status of the boosters, whether they are an unincorporated association or a corporation. In addition, it is important to

know whether they are nonprofit for purposes of R.C. Chapter 1745 and the Internal Revenue Code.¹

ii. Permission to Enter School Property

R.C. 3313.20 vests the board of education with the management and control of school district property. Before construction of the gift begins, the board of education should pass a resolution permitting the boosters to enter school district property for the purpose of constructing the gift. This resolution can also state that the school district has no underlying responsibility for any equipment brought to and left at the site by the boosters and that the boosters will provide full security for such equipment and the site.

iii. Construction Delivery Models

If the boosters undertake the construction of the gift independent of the board of education, the boosters do not have to comply with the public construction delivery models. If there is involvement by the school district (i.e., an underlying contract or specific direction on the progress of the gift imposed by the school district), those laws would apply.

iv. Gift Law

R.C. 3313.36 authorizes the board of education to accept gifts. Typically, this is done by resolution with an attached deed of gift and acceptance of gift. This cannot be done, however, until construction of the gift, however defined, is completed. The gift does not have to be fully completed for the board to accept it; partial gifts and school district contributions toward the gift are permitted.

In accepting the gift, the board should also consider facility disparities among male and female teams. A federal court² held as follows:

It was the school board's responsibility to ensure equal athletic opportunities, under Title IX, for both the girls' softball team and the boys' baseball team, and where the board had acquiesced to a funding system which involved separate booster clubs for each team, the board could be held responsible for the consequences of that approach, even though the board itself provided equal funding to male and female teams.

In accepting the gift, the board of education may honor conditions associated with the gift, as long as those conditions do not divest it of

¹ In order for donations to the boosters to be tax deductible as charitable contributions, the group must obtain a private letter ruling from the Internal Revenue Service (Form 1023).

² *Daniels v. School Board of Brevard County, Florida*, 985 F.Supp. 1458 (United States District Court, M.D. Florida), decided November 25, 1997.

management and control of the school district. Common, acceptable conditions would be to give a facility a certain, appropriate name (e.g., Alumni Hall), or to use a donation for a specific purpose (e.g., weight room). Be aware, however, that naming rights arrangements may cause federal tax issues for any outstanding tax-exempt securities used to finance the facilities or improvements thereto.

v. Risk Management

The school district cannot totally protect itself from claims from injured persons, ensure timely completion of the gift, or ensure that the gift meets the specifications of the school district and applicable building codes. Yet, there are policies that can be adopted to safeguard the school district:

- a) **Access:** The boosters should have guidelines regarding who is permitted at the construction site and have a qualified person overseeing construction. School district equipment used for construction of the gift should be under school district control. Materials should be stored appropriately. The gift should not be used until completed. Once completed, the gift should be used in accordance with school district policy.
- b) **Insurance:** The boosters should have their own liability insurance, separate from the school district, and anybody the boosters hire should have the appropriate insurance. The school district should ensure that it has insurance to cover any risks associated with the project, independent of the boosters' insurance.
- c) **Security:** Even though the boosters will be responsible for the gift during construction, they and the school district should have an understanding of responsibility for securing the construction site. The resolution accepting the gift can state that the school district has no underlying responsibility for any equipment brought to and left at the site by the boosters and that the boosters will provide full security for such equipment and the site.

vi. Communication

The school district and the boosters should meet and discuss the scope of the gift, the needs of the school district, and other issues that would assist the boosters in defining the gift. Communication between the parties is not prohibited. In some instances, boards of education pass resolutions of intent to accept the gift. Such a resolution can declare the school district's ability and willingness to accept gifts and specifically reference the proposed gift by the boosters; the recitals could reference the boosters' intent to provide a gift that will conform with all applicable laws and regulations, describe the general nature of the gift, and outline the purpose of the gift; and a license

can be granted that permits the boosters to enter school district property to construct or cause the construction of the gift. Again, the key is the lack of specific control by the school district over the gift and its progress.

vii. Booster Defaults

If the boosters are unable to complete the gift, and if there is no underlying contract between the boosters and the school district, the school district has no legal obligation to complete the gift or statutory authority to make the boosters a loan to complete the gift.

If the school district chooses to complete the gift, it will want to ensure the following:

- a) full disclosure of all booster contracts and obligations;
- b) appropriate transition from the boosters to the school district regarding access to the site, security for the site, materials storage, etc.;
- c) the gift has no liens or security interests; and
- d) gift financing is not in default.³

viii. Default Prevention

Some school districts have passed policies to prevent boosters from defaulting on gifts.

Sample Permanent Improvement Gift Policy

Before the Board of Education will permit entry on school property in connection with a gift of any permanent improvement, or will accept a gift of any permanent improvement or any labor or materials in connection with a permanent improvement, the individual or non-governmental organization proposing the gift must satisfy the following criteria, as applicable:

- a) Fiscal Responsibility:
 - Funds sufficient to complete the gift must be immediately available prior to beginning acquisition or construction or the donated item(s) must be owned in full.
 - Any fund raisers must:

³ If the school district assumes responsibility for the gift, school officials should carefully examine booster financing arrangements and, if possible, attempt to renegotiate unfavorable terms.

- relate to a gift approved by the Board of Education as to scope; and
 - if school children are involved, have prior written approval of the designated school administrator.
- Gift expenditures over \$_____ must be approved by the designated school administrator and by the Board of Education.
 - No new gifts may be given or started by the same individual or non-governmental organization until all prior gifts are finished and final bills paid.
 - The individual or non-governmental organization proposing the gift must make appropriate arrangements for:
 - liability insurance for those working on the gift; and
 - securing the gift site.

b) Design and Build Responsibility:

- The following scope of the gift must be approved by the Board of Education:
 - Design Plans;
 - Preliminary Schedule; and
 - Site Impact.
- Changes in the scope of the gift must have prior approval of the Board of Education.
- All phases of the gift must have proper permits and inspections.
- The designated school administrator and Board of Education shall be given regular reports on the status of the gift.

3. Capital Campaigns

a. **General Federal Income Tax Considerations**

If the school district has outstanding tax-exempt debt relating to the athletic facilities or improvements thereto, maintaining the tax-exempt status of such debt is critical. Tax-exempt status will be jeopardized if the bonds become "private

activity bonds" or "private loans" prior to maturity. Simply put, the use of the facilities, as well as the way they and their improvements are financed, could have federal tax consequences for tax-exempt debt. Certainly, a governmental unit such as a school district may accept charitable contributions or collect taxes, to the extent permitted by Ohio law, for construction and/or operation without adverse federal income tax consequences for tax-exempt debt used to finance the same. A "private activity bond" is a bond that satisfies either the "private business use test" or the "private loan financing test," thus taxable.

i. Private Business Use Test

The private business use test is satisfied if: (a) more than ten percent (10%) of the bond proceeds are used in the trade or business of any person other than a governmental unit, and (b) the payment of the principal and interest on bonds representing more than ten percent (10%) of the total issue is secured by or derived from property to be used in the trade or business of non-governmental persons. If the private business use of a facility is not related to the government use of such facility or if the related private business use of the facility is disproportionate to the government use, then 5% is substituted for 10% in each of the places it appears in the prior sentence.

ii. Private Loan Financing Test

The private loan financing test is satisfied if the bond proceeds used to make loans to any non-governmental person exceed the lesser of five percent (5%) of the proceeds of the issue or five million dollars (\$5,000,000).

iii. User Charges

User charges levied by a governmental unit are permitted to the extent they are paid by natural persons as members of the general public, either per visit or via a membership for a specified period of time. This is defined as the "general public use" exception.

iv. Leases and Management Contracts

Leases and management contracts may pose problems for outstanding tax-exempt facility debt. Leases of the facility to a non-governmental person will constitute private business use, unless the lease is extremely short (such as less than 30 days). Any management contract that designates a non-governmental unit to manage the facility could be a problem if not structured appropriately. The management contract would not constitute private business use if the contract provided only reasonable compensation that is not based on a share of net profits.

b. Pledges

A pledge program is a common approach for grassroots fundraising, but if not approached carefully will cause tax issues for any school district debt needed for the facilities.

i. Overissuance

Federal tax law requires, generally speaking, that the school district not issue more obligations than needed for the governmental purpose. Additionally, the sum of all gifts intended to be used for construction purposes have to be taken into account for purposes of properly sizing any tax-exempt financing. Accordingly, it is helpful to have pledge forms be tied to a general purpose rather than a specific project. A disclaimer on the pledge form is also helpful:

If your pledge is not needed to complete the Athletic Complex Project, it shall be used to operate the same. Thank you for your support!

ii. Replacement Proceeds

Federal tax law treats moneys pledged to the repayment of debt as “replacement proceeds” of an issue, meaning that they replace borrowed moneys. This raises several concerns:

- a) If these moneys are to be used for construction, that could contribute to an overissuance.
- b) If the pledges are to come in over time and the school district anticipates using them for debt service, it will not be permitted to invest them at a rate in excess of the yield on any outstanding tax-exempt securities used for the facilities. Given where interest rates are currently, that may not be a practical concern; however, it could become one in the future.
- c) Any money coming in as a pledge after the project is placed in service is going to be a private payment and subject to the 10% private business use test.

iii. Private Use Including Naming Rights

Preferential right to the use of any portion of the facility by a non-governmental user, other than general public use, is private use. There may be additional exceptions available for charitable organizations, but that is on a case-by-case basis.

Federal tax law also considers the right to name a facility or a portion thereof as use, although the biggest concern in this regard is naming rights by a for-profit business or business-related foundation (e.g. the Pepsi Center, White Castle Foundation, etc.). Naming rights analysis requires answers to the following questions:

- a) Who is purchasing?
- b) What are they paying?
- c) How long are they paying?
- d) How long will the naming rights last?
- e) For what purpose does the school district intend to spend the contributions? Construction? Debt Service? Other?
- f) What are the annual expenses for the operation of the facility?

This last question is important since the school district may be able to allocate the private payments to expenses, which are not counted in connection with the private payment analysis.

Sample Naming Rights Policy

The Board of Education believes the naming of a facility is a matter of great importance, one that deserves the most thoughtful attention. Facility names should reflect the relationship of the facility to the school and/or the School District.

Naming New Facilities

The Board considers facilities to include, but not be limited to, buildings, athletic fields, stadiums, gymnasiums, libraries, multi-purpose rooms, and conference rooms.

In selecting the name of a new facility, the Board of Education will consider:

- a) Geographic locations;
- b) General features of the area in which the facility is located;
- c) Other names consistent with educational themes;
- d) Individuals may be considered if they meet all of the following criteria:
 - 1) Have made an outstanding contribution to the School District, community, county, state, or nation;
 - 2) Exemplify achievement and qualities in which students and the community can take pride;

- 3) Naming the facility after this individual should have broad recognition and acceptance throughout our diverse society; and
- 4) Naming the facility after this individual will positively impact the education and/or achievement of the students.
- e) Individuals or corporate entities wishing to make a substantial financial contribution for consideration of naming opportunities. The Board directs the Superintendent to implement a selection process that engages appropriate School District and community audiences. The Board will consider the recommendation(s) generated through the selection process after approval by the Superintendent. The Board holds final responsibility for the naming of all Board-owned facilities.

Naming/Renaming Existing Facilities

In naming/renaming existing facilities, the Board believes that facility names should follow the general naming guidelines as noted above. A facility will be considered for renaming only if it is rededicated, if there is a major renovation and/or change in the use of that facility, or there is a substantial tie or association with a person to be honored in the renaming.

The Board will consider requests from school or community groups to name/rename a facility for a person, provided the proposed name has special significance and/or the person has made an outstanding contribution to the school/School District. Further, the naming/renaming of the facility must be a fitting tribute to the individual and the fame of the individual is not faddish. Citizens of the School District should recognize the individual after such facility is named/renamed. The group making the request must agree to provide appropriate recognition such as a plaque, portrait, or marker for the facility. The Board will consider the request after its approval by the Superintendent. The Board holds final responsibility for the naming/renaming of all Board-owned facilities.

B. Crowdfunding in Public School Districts⁴

1. Background and Benefits

⁴ The speaker gratefully acknowledges the contributions of Megan Savage Knox and her assistance in the preparation of these written materials. The authors also recognize the article “*Crowdfunding in Public Schools: Mitigating Potential Liability through Effective Policies*” written by Erin Duryea Gilsbach, Esq. and published by the National School Boards Association Council of School Attorneys on May 3, 2016, which was used as a source in the creation of these materials.

- a. **Crowdfunding:** The practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet.

- i. Two different types of crowdfunding: 1) those aimed at raising capital for a business venture; and 2) those aimed at raising funds for charitable donations.

The charitable donation aspect of crowdfunding is the most common and popular type in the education community.

- ii. The most popular crowdfunding sites include Kickstarter, GoFundMe, and RocketHub.

Popular education-related crowdfunding platforms include DonorsChoose.org, AdoptaClassroom.org, GoFundMe.org, Classwish.org, and Tilt.com.

DonorsChoose.org: Education crowdfunding site that was started in 2000 which describes itself as a site that “empowers public school teachers from across the country to request much-needed materials and experiences for their students.”

In May of 2015, Stephen Colbert announced that he would fund every existing grant request made by a South Carolina public school teacher on the site—he and two other nonprofit organizations pledged \$800,000 to fund nearly 1,000 projects for over 800 teachers at 375 schools.

Samuel L. Jackson recently did the same for all classroom projects posted by the Hamilton County School District in Chattanooga, Tennessee.

As of October 1, 2016, there are approximately 62,500 open projects waiting to be funded, with a total of 804,212 projects funded to date. The site has helped teachers raise over \$437 million since its inception.

Projects range from “iPads for Band,” to “Technology for the Future,” and from “More Balls for More Practice Time” to “Simple stress relievers to help special needs students.”

2. The Pitfalls of Crowdfunding

- a. **Why is Crowdfunding “Bad?”** Teachers are raising money in the name of the school district and/or specific school building. A general lack of oversight from district administrators and absence of district-wide policies regulating the use of crowdfunding can subject *the school district* (not only the individual teacher responsible for the post) to legal liability under a host of state and/or federal laws and regulations, violate a district’s own policies, and paint the district in a negative light to the community, including parents and taxpayers.

It has been described as “[a] situation in which, in the absence of policy, districts have *lots of responsibility but very little control*.”

See *Crowdfunding the classroom*, by Jennifer Fink, District Administration (August 19, 2016) (emphasis added), available at

<https://www.districtadministration.com/article/crowdfunding-classroom>, quoting education fundraising consultant, Michael Montgomery.

b. Legal Implications

i. FERPA/Confidentiality Violations

Teacher posts on crowdfunding sites often include personally identifiable information about students and likely violate FERPA and/or the confidentiality provisions of the Individuals with Disabilities Education Act (IDEA). They also usually include the teacher’s name and school.

Case Study from DonorsChoose.org: A teacher at a South Carolina public school posted detailed information about her special education classroom, explaining that six of her students are male and five of the students are nonverbal. The teacher also included photos of the students, noting that the students are autistic.

Though the photographs of students could be considered directory information (or the teacher may have obtained signed releases from the students’ parents), posting the picture and referring to the pictured students by their specific disabilities would likely be a FERPA violation.

ii. IDEA/Section 504 Violations

Teacher posts on crowdfunding sites can also implicate other provisions of the IDEA and/or Section 504, depending upon the type of information that the teacher includes.

Case Study from DonorsChoose.org: The same teacher from South Carolina also explained that her students really needed iPads to help them properly communicate, noting that their failure to do so “has led to some discipline issues.”

Both the alleged need for the devices as assistive technology for students with disabilities in her classroom and the fact that the teacher indicated that the students were 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.

Case Study from DonorsChoose.org: A teacher in California discussed in her post on DonorsChoose.org that her students have not been able to

achieve the math goals contained in their IEPs because they do not have the appropriate materials (such as puzzles) to help them do so.

The fact that the teacher is admitting/alleging that her students are not making appropriate progress toward their goals opens the district up to potential liability, as it is arguably required to provide all items necessary to help students on IEPs make adequate progress.

Similarly, teacher posts themselves can admit liability (e.g., a teacher post that states: “The special education program at the school district for which I work is not very supportive in making sure that children have the materials that they need to ensure that they are successful students.”)

iii. Effects on Immunity

School districts are generally immune from liability in civil actions for injury, death, or loss to person or property allegedly caused by any act or omission of the district itself or its employees who are “acting in the scope of their employment.” *See, generally*, R.C. 2744.01 through R.C. 2744.03.

School districts are also required to defend and indemnify those employees acting “both in good faith and not manifestly outside the scope of their employment or official responsibilities.” R.C. 2744.07.

Are teachers acting in the scope of their employment or official responsibilities when they take matters into their own hands and create teacher posts on crowdfunding websites?

Is a district still responsible for the actions of a teacher and/or a teacher’s commentary on a crowdfunding post? (e.g., potential for defamation suits that could arise from posts, safety concerns for students identified in photographs, or other unfortunate events that could occur?)

c. Ethical Considerations

i. “Other Compensation”

- a) R.C. 2921.43(A)(1) prohibits any public servant, including public school teacher or other school district employee, from knowingly soliciting or accepting any compensation to perform their required official duties or as a supplement to their public compensation.
- b) The Ethics Commission has made clear that school district employees are prohibited from accepting additional compensation from boosters’ groups for coaching sports teams or assisting with school-related activities:

“For the performance of their public duties, school district employees can receive only the compensation that is provided by the district pursuant to the terms of the employment relationship.” *See* Ohio Ethics Commission Advisory Opinion No. 2008-01.

Based on this decision, it is clear that a public school district is the **only** lawful source of compensation for performance of teaching duties.

When a teacher uses crowdfunding websites to raise funds for school activities, the receipt of such funds is ethically questionable, as it is unclear whether the proceeds and/or items are provided to the individual teacher rather than to the school itself.

- c) There is also no guarantee that the proceeds and/or items received are used for their stated purpose, which invites additional ethical questions and concerns — and could invite criticism from donors who expect that their money is being used in a certain way.

ii. Audit Compliance

Internal (and external) audits may reveal assets coming into the district from unfamiliar (and potentially inappropriate) sources.

There is also a risk that the incoming revenue is not being properly accounted for, pursuant to the uniform system of accounting and internal control procedures (e.g., the district treasurer is the custodian of **all** funds, under R.C. 3313.51).

What happens when individual teachers receive the funds directly and purchase items for their classroom with such funds without going through the Treasurer’s office? This could also invite criticism from the Auditor of State, including a time-intensive and/or expensive audit process.

iii. The Licensure Code of Professional Conduct for Ohio Educators

Crowdfunding implicates several sections of the Licensure Code. The Code deems unauthorized solicitations of funds and improper handling of those funds as “conduct unbecoming” an educator.

d. Policy Violations

In addition to violating state and federal laws or regulations, teacher posts and other entries on crowdfunding websites can violate a school district’s own policies.

i. Wellness Policies

Case Study from DonorsChoose.org: A teacher post asked for \$1,769 for “food-based positive behavior incentives,” and stated that the money would be used to buy certain snacks (e.g., juice, lollipops, hot chocolate, cookies, chips, and chocolate truffles). The post prompted the district to review its wellness policies, which prohibited a number of the specific items requested in the post.

ii. Solicitation Policies

OSBA’s policy on Staff Gifts and Solicitations includes the following provision:

“The Superintendent annually approves all solicitations which are to be permitted in the schools. No organization may solicit funds of staff members in the schools, nor may anyone distribute flyers or other materials related to fund drives through the schools, without the prior approval of the Superintendent. Employees may not engage in the sale of products to the schools, even if the proceeds of such sales are intended for charitable or civic purposes. ***No staff member is to collect any money or distribute any fund-raising literature without the express approval of the Superintendent.***” (emphasis added)

“No requests for funds shall be made to any individual, business, foundation, service club or other agency for any classroom or school program or project without the approval of the Superintendent. All such requests are to be submitted to the building principal or the appropriate supervisor who will determine whether the request will be forwarded to the Superintendent.”

iii. Academic Freedom and Curriculum Policies

“The right of teachers to teach certain subjects or to employ certain teaching methods may be restricted by the Board of Education where such subjects or methods are deemed by the board and/or district administrators to be educationally unsound, inappropriate for the age or maturity level of the students, or irrelevant to any valid educational objective.”

iv. Public Donations Policies

“Gifts, grants or bequests are accepted by the Board, provided the conditions of acceptance do not remove any portion of the control of the District from the Board. Gifts made to the District become the property of the Board. Their use is regulated by the individual school under the direction of the Board. Any person or organization desiring to give a gift or make a grant or bequest to the Board must contact the Superintendent, who submits the

request to the Board. Proposals for giving funds, equipment or materials to the District with a “matching” agreement or restriction are discouraged.”

v. Social Media Policies

“Employees should be aware that our community at large may observe content and information made visible by employees through their personal social media and online activities. Employees should refrain from posting material that is either inappropriate or harmful to the School District, the Board, its employees, or our students. Personal online activity that violates the Board’s policies will subject an employee to discipline.”

e. **Public Relations/Reputational Issues**

Teacher posts that criticize a school district can also affect the school district’s reputation in the community and call into question the effectiveness of the district and the quality of services provided.

Case Study from DonorsChoose.org: Teacher post requests \$2,164 in New Mexico (“My students need and deserve the best and with an up-to-date teacher workroom us teachers, can deliver our best, as well. We are in need of basic teacher items.”) (emphasis added)

Posts like this portray the district in a negative light and call into question its spending of taxpayer money, treatment of teachers, and quality of personnel and services.

f. **Dispute over Ownership of Materials Purchased With Funds**

Case Study from DonorsChoose.org: “iPad Please! We Need Some "Tech" in our "Teach." My students need an iPad to be able to connect with the world in new ways and build early literacy, math and technological skills.” Current post from a kindergarten teacher in Chicago.

If the teacher raises the funds needed and purchases the iPads, who owns the iPads—the teacher or the school district?

If the teacher moves to a different classroom, can she take the iPads with her?

What about if she moves to a different district?

How will the school district dispose of the items and account for them in its records?

3. Policy Suggestions

- a. Adopt district-wide policies for online crowdfunding, including a formal approval process and a rule that all money or products received become district property.

- b. Prohibit all raising of revenue using the district's name, logo, or other identifying marks without prior approval.
- c. Require written administrative approval of all postings before they are published and reserve the right of administrators to deny permission for a teacher to crowdfund, in the administrators' discretion.

Administrators should carefully review all proposed posts to ensure that no potential legal liability, violation of state/federal laws, and/or violation of any district policies and to ensure that the district is not portrayed negatively or criticized.

- d. Review and revise school policies to ensure that school employees are prohibited from posting student images on the site without securing all appropriate permissions and ensuring that posts do not identify the students or their personal circumstances.
- e. Create an approved site list—and only permit crowdfunding on sites that send proceeds directly to the schools (or designated administrators) and not to the individual teachers.
- f. Establish accounting processes for solicited and received crowd-sourced funds.
- g. Require all crowdfunding requests to have a clear beginning and ending date within the same school year.

C. Profiting From Your District's Intellectual Property

1. Background and Benefits

- a. A school district's name, brand, logo, mascot, and other images are all intellectual property that districts can use to generate revenue (and which need to be protected from generating revenue for the wrong people).
- i. *Case Study:* Miami-Dade County Public Schools (MDCPS) sued Seattle-based retailer www.prepsportswear.com in July of 2015 for selling tee-shirts, sweatshirts, hats, and other apparel containing the school district's name, logo, and mascot. The retailer was unaffiliated with the district and did not have permission to use the district's logos and likenesses.

The retailer was selling the sweatshirts for \$54.99, the hats for \$21.99, and the tee-shirts for \$19.99.

- ii. *Case Study:* The Commonwealth School, located in Boston, Massachusetts sued the "Commonwealth Academy" prep school, also located in Boston, this summer for infringing on the trademark of its name.

- iii. Case Study: A number of area businesses in Birmingham, Alabama, including an unauthorized alumni organization, were using the Vestavia Hills High School's logo to sell merchandise online. The organizations, which profited from such use, did not return any of the profit to the school system. In response, the school district made the decision to trademark its logos and other images.
- iv. Case Study: Athletic and band boosters in Toledo, Ohio began selling apparel containing a local district's logo to raise funds in 2013, without authorization from the district.

2. Options for Districts

a. **Protecting Your Trademark**

- i. **Trademark**: Protects words, phrases, symbols, or designs identifying the source of the goods or services of one party and distinguishing them from those of others. Trademarks are available in two forms:
 - a) Trademarks: Names or symbols used on **goods**.
 - b) Service Marks: Names or symbols that are used to identify and distinguish **services**.
- ii. Common Law Rights
 - a) Ownership rights in trademarks may be recognized based upon their mere use in commerce, regardless of any formal registration.
 - b) These "common law" trademark rights are effective to the extent that a claimant can demonstrate them in court.
 - c) They are generally limited to the geographic area in which prior use can be established.
- iii. Formal Registration

Prior to formally registering logos, names, or mascots, it is important to check them against existing trademarks to ensure they are not already taken and would not violate someone else's trademark (e.g., performing a clearance search of the mark through the U.S. Patent and Trademark database).

 - a) State Registration

A valid state registration creates a legal presumption that its holder has the exclusive right to use the mark ***within the state***.

It does not create any legal presumption for use outside the state.

State trademarks do not carry particularly strong presumptions, as they are not rigorously examined by most Secretary of State Offices.

b) Federal Registration

Federal registrations are generally preferred when available, as a federal registration creates the strongest legal presumption for owners and supersedes any subsequently filed state registrations.

Registration Process:

- Define the description of goods or services and identify precisely how the district uses the mark with these goods or services;
- Perform a clearance search of the mark to determine whether someone else may have superior rights with similar goods or services; and
- Prepare and electronically file the trademark application, which requires a government filing fee of \$275 or \$325 (for custom descriptions of good/services).

b. Licensing Trademarks

- License:** Grants others permission to use or share another's intellectual property. Districts can license their trademarks and generate revenue through licensing agreements and royalties stemming from such third-party use.
- Trademarks can be licensed exclusively to a single licensee or licensed non-exclusively to more than one licensee (school districts will likely license non-exclusively to more than one licensee).
- If a district grants a license to use of the district's intellectual property to any third-party, a comprehensive Licensing Agreement is recommended.

Licensing Agreements help to ensure that a school district retains adequate control over the quality of goods or services produced by the licensee.

iv. Suggested Provisions:

Use of Marks

- State that the license is non-exclusive and non-transferable;

- b) Identify both the “Licensed Marks” (the words, works, marks, logos, and identifying features) and the “Licensed Products” (the products and/or offerings to be manufactured, sold or distributed in connection with the license);
- c) Establish a territorial limitation on the sale of the Licensed Products (e.g., “within a 25 mile radius” of the district offices);
- d) Prohibit assignment of the License Agreement by the third-party and the granting of any sublicense by the third-party without the district’s prior written approval;
- e) State that the district is the “sole and exclusive owner of all rights, title and interest” to the Licensed Marks; and
- f) State that the goodwill, the value of the goodwill, and all accompanying rights of the Licensed Marks belong exclusively to the school district.

Quality of Merchandise

- a) Require third-party to agree that Licensed Products will be adequate style, appearance and quality; and
- b) Require third-party to agree that Licensed Products will be manufactured, sold, and/or distributed in accordance with all applicable federal, state, and local laws.

Payments by Vendor

- a) Include the royalty amount to be paid to the school district (e.g., a royalty of 10%) of all the third party’s sales (and explicitly define “sales”);
- b) Require periodic statements from the third-party showing the number and description of the Licensed Products bearing any Licensed Marks during a stated period of time (e.g., from July 1 to June 30 of the preceding year); and
- c) State to whom the royalty payments should be sent (e.g., the Superintendent, Treasurer, Business Manager, etc.)

Miscellaneous Provisions

- a) Disclaim all representations and warranties related to the Licensed Marks and Licensed Products;

- b) Require third-party to indemnify school district for any and all claims arising from use of the Licensed Marks, or breach of the License Agreement.

DON'T agree to indemnify the third-party—Ohio law precludes reciprocal indemnification by a school district; and

- c) State that the License Agreement does not create a joint venture between the district and the third-party.

c. Protecting Copyrights

- i. **Copyright:** A form of legal protection for original works of authorship including literary, dramatic, musical, and artistic works, fixed in a tangible medium of expression (including both published and unpublished works).

Examples: Books, curriculum, pictures, videos, music, presentations, software, web pages, blogs, job descriptions, digital curriculum, test questions and answers, factual compilations, etc.

Copyright controls how intellectual property will can be used and distributed. protects against reproduction, derivation, distribution, public performance, public display, and transmission—do you know where your district's content has been and where it's going?

Districts can register its “works” by applying online (and paying a \$35 fee) or applying by mail (and paying an \$85 fee). Districts should only register works that are:

- a) Owned by the district;
- b) Under license;
- c) Not subject to any applicable defenses/exceptions

- ii. **IP Ownership of Teacher Works:**

- a) **Author = Owner.** In general, authors own the works they create unless assigned.
- b) **“Work for Hire”** Employer is considered the “author” for works created by employees for their employer in the scope of their employment.
- c) **Teacher Exception?** Long established right of K-12 teachers and collegiate faculty to own lesson plans, curriculum, lecture notes, and other writings. However, the 1976 amendments to the Copyright Act

create legal uncertainty by failing to explicitly include the teacher exception in its definition of Work Made for Hire.

- d) **New Platforms Further Muddy the Waters.** Teachers are increasingly using new technology, including digital curricular resources and tools, in their classrooms—often independently creating, modifying, and sharing learning materials. New platforms change the dynamics of IP ownership (e.g., a teacher creates their own, personally branded YouTube channel featuring videos of instructional practice).
- e) **Recommendation:** Clarify ownership issues by written agreement and/or school policy.

d. Licensing Copyrights

- i. Just as school districts can license their trademarks, they can also license their copyrights to generate revenue.
- ii. Copyrights can be licensed exclusively to a single licensee or licensed non-exclusively to more than one licensee (school districts will likely license non-exclusively to more than one licensee).
- iii. As with trademarks, districts should enter into a Licensing Agreement to ensure that the district protects its copyrights.
- iv. Suggested Provisions:
 - a) State that whether the license is exclusive or non-exclusive
 - b) Royalties – how much upfront, guaranteed annual minimums, percentage of sales, seat licenses, etc.
 - c) Specifically identify the “Works” that are being licensed;
 - d) Establish a territorial limitation within which the Works can be used
 - e) Prohibit any sub-licensing without prior written authorization;
 - f) Reserve the board’s right to decide, in its sole discretion, that the Works shall be discontinued;
 - g) Require the Licensee to comply with all applicable board policies, any board directions and specifications for the use of the Works, and all other laws and regulations relating to the Licensee’s operations;
 - h) Disclaim all liability for Licensee’s general operations,
 - i) Require Licensee to indemnify school district for any and all claims arising from use of the Works.

DON'T agree to indemnify the third-party—Ohio law precludes reciprocal indemnification by a school district; and

- j) State that the License Agreement does not create a joint venture between the district and the third-party.

e. Protecting Your Works

- i. Taking steps to formally register and copyright district-owned intellectual property is necessary to prevent third-parties from improperly benefiting from its brand.
- ii. File new copyright applications on each published version.

3. Policy Suggestions

- a. Reserve the rights to all intellectual property, including intellectual property created by school employees, on behalf of the school board.
- b. Designate which individuals within the school district have the authority to enter into contracts regarding intellectual property use on behalf of the board.
- c. Mandate that no individual or group is permitted to profit from the intellectual property of the school district without express permission of the board of education or its specific designee.
 - i. State that only vendors approved by the board can produce merchandise bearing the district's intellectual property and provide for remedies for the district in the event merchandise is produced without proper authorization (e.g., the merchandise will be considered counterfeit or infringing and subject to all available legal remedies, including seizure of the merchandise).
 - ii. Establish clear restrictions on use of the district's intellectual property by booster clubs, foundations, and other district support organizations.
- d. Create a policy governing the licensing of district IP, outlining to whom the district will license, the restrictions of such licenses, and the requirement that any licensees will enter into a Licensing Agreement.
- e. Review employment contracts and collective bargaining agreements to ascertain if any rights are expressly being given with regards to intellectual property ownership.
- f. Establish a process for monitoring the unauthorized use of the district's intellectual property.

- g. Establish a district policy addressing ownership of IP that encourages sharing and empowers educators.

The foregoing is a summary of legal developments, and this document and the accompanying presentation are not intended to offer legal advice. Please be sure to consult the full text of legislation, regulations, and cases. Also, please be sure to consult competent legal counsel for specific legal issues.