

Public School Fundraisers: The Legal Obstacles and Protections for School Officials

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Abstract

In the world of public school finance, fewer resources are being allocated to curricular activities, let alone cocurricular activities. To help ameliorate budgets for clubs, athletic teams, and other groups, students with the guidance of school officials conduct fundraisers. Many of these fundraisers were once perceived as innocuous with opportunities to build group or team spirit. However, current legal paradigms make conducting fundraisers much more nebulous, increasing liability for school officials. This article serves three purposes: (a) it articulates legal philosophies that must be adhered to in order to avoid negligence or constitutional violations, (b) it identifies several, typical fundraising activities and the legal framework that guides them and opportunities to avoid pitfalls, and (c) a compendium is provided with each section and a discussion section, which synthesizes the various legal frameworks into a general paradigm by which practicing administrators can implement in order to avoid violations and/or liability.

Keywords

public school law, fundraisers, administrative leadership

School Fundraisers: Legal Review and Recommendations

Fundraisers are a quintessential school activity, which student groups, clubs, and teams employ to offset the cost of activities and materials the group desires or needs in order to meet its mission. Bake sales, spaghetti dinners, car washes, 50/50 raffles,

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and casino nights and auctions are all common activities used by curricular and cocurricular groups to raise funds. These activities have become even more popular as general fund budgets for public education have steadily declined over the past several years in response to constricting state coffers. To avoid basic and cocurricular programs from being reduced or eliminated, schools are now forced to raise funds independent of restricted revenue. As innocuous and helpful as fundraising activities might seem, they cause consternation for administrators concerned about the legal exposure inherent in their implementation, particularly as related to potential legal liability or harm the school or school employee could unwittingly incur.

This article is a synthesis of the potential legal exposure arising from the permissibility of various fundraisers. While not all legal scenarios can be accounted for, six primary areas are addressed (a) tort liability, (b) Constitutional violations, (c) Title IX, (d) activities of chance, (e) food sales and preparation, (f) city ordinances, and (g) copyright laws. Since the majority of legal pitfalls encountered in fundraisers encompass one or more of these subjects, school administrators should have a comprehensive knowledge of these areas in order to avoid liability. Importantly, school officials must be proactive in their efforts to limit their legal exposure, particularly when dangerous conditions could arise from a fundraising effort. They must provide warnings regarding known or reasonably foreseeable hazards (DeMitchell, 2007) because pleading ignorance is a poor strategy if an educator should have known about a dangerous situation.

This article will define legal concepts, identify specific law guiding the situation, amplify case law enhancing the concept, and provide suggestions of best practice to mitigate school and individual liability. While most actions by public educators completed within the scope of their job indemnifies them from personal liability, the time spent on these issues and financial resources expended to make whole individuals who have been harmed can be weighty, which causes these financial and human resources to be used in ways not best suited for student growth. Therefore, appropriate legal knowledge of these periphery activities, combined with appropriate systems to monitor them, can reduce time and money in legal contests.

Tort Liability

Torts are a common point of legal contention that school administrators encounter. A tort is a “civil wrong, independent of breach of contract, for which a court will provide relief in the form of damages” (McCarthy, Cambren-McCabe, & Eckes, 2014, p. 418). Torts involve wrongful conduct or forced obligations, meaning obligations placed on persons without regard to their agreement, and defined by case law based on society’s view of what duties and obligations one person owes to another (Michaud, 2014). Torts are classified into four categories: intentional interference, strict liability, defamation, and negligence (Alexander & Alexander, 2014).

Negligence is the most common tort action (Michaud, 2014) and the type of tort most schools encounter. Negligence is defined by the following characteristics: (a) the failure to exercise the standard of care that the doer as a reasonable person

should have exercised in the circumstances, (b) undue indifference toward the consequences of one's act, or (c) a tort that includes the notions of duty, breach of that duty (unreasonable conduct), and resultant damage (Garner, 1995). An allegation of failure to provide adequate supervision for students is arguably the most common negligence claim. Since educators are held to the standard of a reasonable and prudent parent, acting *in loco parentis*,¹ they have a general duty to instruct, reasonably supervise, and protect children from known or reasonably foreseeable dangers while the children are under the teacher's care (Dayton, 2012). As such, obligations of an educator include (a) providing adequate supervision; (b) provide proper instructions; (c) provide properly maintained buildings, grounds, and equipment; and (d) provide warnings regarding known or reasonably foreseeable hazards (DeMitchell, 2007).

Characteristics of a Negligence Claim

Four criteria must be met for a negligence claim to be brought against a school or school employee. They include the following:

- Duty of care;
- Breach of duty;
- Legal cause;
- Damages (Alexander & Alexander, 2014, pp. 641-643).

Duty of care is an obligation to conform to a standard of conduct prescribed by law that requires one to act with due care, meaning reasonably (Michaud, 2014). A duty of care does not require prevention, only reasonable care to prevent harm. Most often, school employees are responsible for the supervision of students during the school day and at other times when students are under their direct control (*Bowers v. City of New York*, 2002; *Kazanjian v. Sch. Bd.*, 2007; *Winter v. Bd. of Educ. City of New York*, 2000). School employees assume a duty of care standard equal to that of a reasonable and prudent parent, and if the employees are unaware of their duty, it can lead to liability for the school and employees, potentially concluding with damages being awarded to the injured party.

The second element in determining whether negligence occurred is to determine if there was a *breach of duty*, or a "Failure to use reasonable care under the circumstances, judged by the reasonable person standard" (Michaud, 2014, p. 138). Key in breach of duty is the concept of foreseeability of the injury sustained by the student. Importantly, a student with an injury does not constitute proof that a standard of care was breached. This is because school employees are not expected to prevent every conceivable injury; they are only expected to take reasonable precautions to prevent foreseeable injuries. Demanding that school officials supervise students every minute of the day is an unreasonable expectation. However, the longer students are unsupervised the greater the likelihood that a breach of duty will be found (Imber, Van Geel, Blokhuis, & Feldman, 2014).

The third element needed to justify a negligence claim is proximate or *legal cause*. Establishing legal cause requires that the injury incurred is reasonably associated with the negligent conduct (Imber et al., 2014). A legal cause requires the following two conditions be met:

- Causation in fact: The injury must be a result of the negligent party's act;
- Proximate cause: The act must be sufficiently connected to the injury to be considered its cause (Imber et al., 2014, p. 465).

The final element of negligence is injury and/or *damages*. In order for liability to be present, the student must suffer actual harm or injury. Evidence must be present that the injury resulted from acts committed by school personnel or their failure to act prudently in a given situation. The person claiming injury must demonstrate that some compensatory damages are related to the injury (Essex, 2016).

While students may participate in fundraising activities that occur on and off school premises, the duty to protect students from injury does not lessen because of the location of the activity. School officials, and those directly monitoring the activity, must reasonably foresee potential injury during fundraising activities and attempt to mitigate negligent practices. It is crucial for school personnel to recognize that they have a duty to care for students even when the times and locations of a fundraising activity are outside of the traditional school paradigm and schedule.

Recommendations for Avoiding Negligence Claims

In order to minimize the potential for legal action due to negligence, school leaders should take several factors into account when implementing fundraisers activities:

- Provide warnings regarding known or reasonably foreseeable hazards;
- Provide proper instructions to reduce the risk of injury;
- Ensure that instructions are reviewed more than once (DeMitchell, 2007);
- Incorporate the age, capacity, and past behavior of students when addressing foreseeability;
- Establish procedures that are consistent with board policy and require all fundraising groups, clubs, or teams to comply (Imber et al., 2014).

Constitutional Violations

Some fundraising activities conducted by public schools have the potential to encroach on constitutional protections, for example, fundraisers that provide the purchaser with an opportunity to place a personal message on a tangible item, such as a brick, tile wood panel, or paper (Mawdsley, 2006). Displaying messages on these types of items in a public school enhances the tension between protecting a person's right of expression under the Free Speech Clause and the public school's obligation to prohibit religious expression violating the Establishment Clause.

Discerning the fine line can be challenging for school administrators, and jurisprudence offers little relief:

Unfortunately, because Supreme Court decisions concerning the appropriate balance between free speech and the establishment clause are fact-specific and the Court has yet to address a case involving personal messages displayed on school premises, legal principles must be extrapolated and applied from case law that is available (Mawdsley, 2006, p. 909).

Therefore, it is prudent for public school administrators to be cognizant that fundraising activities that invite the community to place messages on public school property may not be guided by precise canons that mitigate liability.

Forum for Speech and Viewpoint Neutrality

The Supreme Court created a test known as the “public forum analysis,” which defines the conditions under which schools may restrain speech and expression (*Perry Education Association v. Perry Local Educators’ Association*, 1983). The public forum analysis identified three types of fora (a) traditional public forum, (b) limited or designated public forum, and (c) closed or nonpublic forum.

A traditional public forum is a place, by long tradition, or by government fiat, such as streets or parks, that “have immemorially been held in trust for the use of the public, and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions” (*Perry Education Association v. Perry Local Educators’ Association*, 1983). In a traditional public forum, speech may be prohibited or limited only if there is a compelling state interest (Alexander & Alexander, 2014).

A limited public forum is created when schools open their facilities or properties for “use by the public at-large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects” (*Cornelius v. NAACP Legal Defense & Educ. Fund*, 1985). A public school is not required to establish a limited public forum, but once created, it is subject to the same regulations as a traditional public forum (Alexander & Alexander, 2014). “In a limited or designated public forum, a public agency may insist that the forum be restricted to specific categories of speakers . . . and impose different restrictions or limitations on others seeking access” (*American Civil Liberties Union v. Mote*, 2005). Any restriction on speech must pass a strict scrutiny test² and must be viewpoint neutral (Alexander & Alexander, 2014).

The final type of forum is a nonpublic or closed forum, which consists of public property, but not by tradition or designation a forum for public communication (*Perry Education Association v. Perry Local Educators’ Association*, 1983). A school could potentially declare its facilities closed; however, it would require being closed to all external groups.

Inherent in a school administrator’s responsibility is to identify the type of forum a school establishes to maintain the concept of viewpoint neutrality. Viewpoint neutrality requires the school and its employees to not discriminate against students on the

basis of the views they express. Viewpoint discrimination is the regulation of speech when the specific motivating ideology, or the opinion or perspective of the speaker, is the rationale for the restriction (*Demmon et al. v. Loudon County Public Schools et al.*, 2004).

Religious contention is frequently at the center of viewpoint neutrality issues as schools must be cognizant that their actions, collectively, or individually, may bear the imprimatur of the school. Thus, certain religious components may be viewed as receiving favoritism, which violates the Establishment Clause of the First Amendment. In contrast, public schools that prohibit various actions due to a conflict in viewpoint are violating the principle of neutrality. This is amplified when schools have established a limited public forum, and then attempt to exclude an organization because the administration does not support the viewpoint espoused by the group seeking to use the facility or grounds.

The Legal Precedents for Messages on Display at School

Fleming v. Jefferson County School District (2002) identifies the need for public school administrators to provide adequate forethought prior to an event to ensure compliance within the law of school-sponsored speech. After the shooting that occurred at Columbine High School and prior to reopening, in the quest to help students reacquaint with the school and become more familiar with their surroundings, the school initiated an art project, whereby the students could create artwork on a 4-inch by 4-inch tile that was installed above the molding throughout the hallways of the school. The area administrator restricted what could be placed on the tiles in the attempt to maintain a positive learning environment. In addition, the administration did not want the interior of the building to become a memorial to the tragedy. The area administrator, in conjunction with other district administrators, decided that there could be no references to the attack or the date, no names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive. Tiles that did not conform to the guidelines were not to be hung. In addition to students of the school, the district invited other members of the affected community, such as family members, rescue workers, and health care professionals to participate.

Some people expressed dissatisfaction with the regulations expressing their desire to place religious messages, symbols, and victims' names on the tiles. Parent volunteers, who were affixing the tiles to the wall, were instructed not to hang any of the tiles that did not meet the guidelines. On review by the area administrator, an approximate 80 to 90 other tiles were found to have not met the guidelines and were removed. After the artists of these tiles were notified of the decision to remove them, members of this contingent filed suit against the school claiming that their rights of speech had been violated. The district relaxed some of the restrictions, but maintained their position that individuals could not paint religious symbols, the date of the shooting, or anything offensive or obscene. None of the plaintiffs returned to the school to paint tiles because they had made the expressions previously, or were denied the opportunity to paint the tiles they wanted to paint.

School-sponsored speech is student speech that a school “affirmatively . . . promotes, as opposed to speech that it tolerates” (*Hazelwood v. Kuhlmeier*, 1988). The U.S. Tenth Circuit Court found that the painting of tiles, couched in the guidelines delineated by the school district, did embody school-sponsored speech. Two critical concerns emanated from the *Hazelwood* case articulating the standard for school-sponsored speech: the imprimatur of the school and the involvement of a legitimate pedagogical interest. The *Fleming* court noted that the district did not by “policy or practice” open the tile project for indiscriminate use by the general public.

In another example, *Demmon et al. v. Loudon County Public Schools et al.* (2004) dealt with a fundraising project sponsored by a parent group associated with the school. The group initiated a fundraising project in which it solicited sales of engraved bricks that would create a “walkway of fame” in front of the high school near the flagpole. An option to engrave symbols on the bricks would yield additional revenue. Some bricks were inscribed with Latin crosses, which were subsequently removed by school officials claiming their placement violated the Establishment Clause. In addition, the school contended that the walkway constituted a nonpublic forum, a point, which the plaintiffs disagree.

Demmon offers several legal points for school administrators to reflect on when dealing with analogous fundraising situations at their schools. For example, prior to the creation of the walk of fame, the walkway was not open for public expression. The school intended that the purchase of bricks would be limited to students, their families, and individuals who wished to honor students or employees of the school. The fundraiser was simply an economic transaction between the donor and the school for a limited amount of expression. While the school contends that it did not seek to establish a limited public forum, its actions were contrary. The school supported the activity by encouraging patrons to purchase a brick and leave a permanent memory of all members of the internal and external school community. The board administering the fundraising project did not limit the expression, but, in fact, advertised the opportunity to include a “selected phrase.” The school did not review or censor the content of the text messages on the bricks until it found fault with Latin crosses being placed on the bricks. As the walkway was opened up for a limited amount of expression related to the school community, the court found that the walkway is a limited forum because there was intent to create a public forum for limited expression by the purchasers of the bricks (*Demmon et al. v. Loudon County Public Schools et al.*, 2004).

With a limited public forum established, the school permitted groups within the community the opportunity for certain types of expressive activities (*Demmon et al. v. Loudon County Public Schools et al.*, 2004). This is paramount because what types of expression are permitted determines whether the school engaged in viewpoint discrimination. If the school had prescribed the limited public forum to permit only school-sponsored activities, then prohibiting the Latin cross on the bricks would have been viewpoint neutral. In the absence of this declaration and the support by the school of “a selected phrase” on the brick, the school encouraged freedom of expression. The school lacked the foresight at the project’s inception to proscribe certain speech on the bricks.

In a final example, Pattison Elementary School in Katy, Texas, was the stage for a challenge of free speech by the parents of students engaged in a fundraiser. The school contracted with a third party to produce holiday cards using artwork created by the students. Parents were able to purchase the holiday cards with 1 of 12 preset messages. An order form went home with the students, yet the only message to be blacked out was a quote from the New Testament. The school contended the messages placed on the holiday cards bear the imprimatur of the school, thus making it government speech. The message was redacted because of its particular viewpoint. The school was attempting to avoid violating the Establishment Clause. However, the court found that the school did engage in viewpoint discrimination because the presence of Biblical quotations was not pure government speech and did not raise the possibility of disruption of the learning environment (*Pounds et al. v. Katy et al.*, 2010).

Public school administrators are placed in an untenable position when it comes to arbitrating free speech rights and constitutional restrictions placed on the school when dealing with religion. In spite of the fact that a plethora of litigation has been adjudicated, and the subject has been analyzed *ad nauseam* in scholarly literature, there remains a “lack of adequate guidance to enable teachers and principals to determine whether the decisions they make comply with constitutional standards” (*Morse v. Frederick*, 2007). As seen in *Pounds v. Katy* (2010), administrative decisions, such as fundraisers for elementary schools, which seem innocuous enough, may lead to protracted litigation.

Recommendations for Avoiding Constitutional Violations

Even though specific parameters are not available to ensure schools do not become entangled in these types of issues, there are some broad ideas administrators can subscribe to in order to mitigate potential violations when dealing with free speech and fundraisers:

- Eliminate all personal messages. Limit message content to a name and date. This presents no First Amendment problems because no expressive rights are involved. No one has a free speech right to leave a personal message where denial of such messages is evenly enforced;
- Prohibit all religious messages along with profane and offensive ones;
- Prohibit disruptive messages. Permit religious messages but then prohibit or restrict them if they disrupt the educational function of the school (Mawdsley, 2006).

Title IX

Ensuring gender equity for all public schools receiving federal funds is explicitly mandated in Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681, 2012). Under Title IX, schools are prohibited from discriminating, excluding, or denying benefits because of gender differences. Within the context of Title IX is the goal to correct

unequal treatment of male and female athletic teams. In order to be compliant with this goal, schools should (a) provide interscholastic sports opportunities for both sexes in terms of numbers of participants that are substantially proportionate to the respective enrollments of male and female students, (b) show a history of expanding sports programs for the underrepresented sex, or (c) provide enough opportunities to match the sports interests and abilities of the underrepresented sex (Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, 2012). Most Title IX contentions in athletics are focused on equality of opportunities and appropriate arenas for competition.

Booster clubs, alumni, and in some cases, corporate sponsors, that may or may not be sanctioned by the school, contribute money to athletic program budgets. Fundraising activities conducted by school groups and nonschool organizations, such as booster clubs, may create a situation whereby different levels of fundraising success (or lack of success) justify a disparate benefit claim. Title IX does not require male and female athletic budgets to match dollar-for-dollar; however, the bottom line is that the benefits provided must be equal. An institution is not absolved of this responsibility when disparate benefits are created by successful or unsuccessful fundraisers. Educational institutions cannot use an economic justification for discrimination (Title IX, 2012). In those instances where fundraisers may lead to disparate benefits, administrators should identify benefits of equivalent importance that may be provided to offset disparities.

Title IX and External Donations

A specific area of interest for school administrators regarding fundraising within Title IX regulations is when a school accepts outside financial assistance (booster club, corporate sponsor, private donation) that allows vast gender differences to emerge at the hands of a third party. Title IX regulations warn that to “aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit or service to students” (Bonnette & Lamar, 1990, p. 5) is a violation (Title 34, C.F.R. § 106.31(b)(6), 2012). The concept of benefit equality is further amplified in the *Title IX Athletics Investigator’s Manual*, “Where booster clubs provide benefits or services that assist only teams of one sex, the institution shall ensure that teams of the other sex receive equivalent benefits and services.” The *Manual* further notes,

If booster clubs provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex, then the institution shall take action to ensure that benefits and services are equivalent for both sexes. (Bonnette and Daniel, 1990, p. 5)

According to federal law, booster club money is equivalent to taxpayer dollars. The source of the funds is irrelevant; the benefit provided is the measure (Pennepacker, n.d.). With the myriad of duties administrators assume, monitoring benefit equity may seem to be a tedious task, but if the outside revenue sources result in an inequity

between boys' and girls' programs, the school must correct the inequity using its own funding, if necessary.

Recommendations for Limiting Violations of Title IX

School administrators should consider implementing the following suggestions in order to avoid violating the spirit of Title IX legislation:

- Establish one large booster club for all activities. Financial resources can be allocated through this one organization ensuring equality in distribution;
- The principal or his or her designee should attend booster club meetings in order to establish equitable treatment of other groups or teams that may incur disparate treatment due to the fundraiser;
- The principal or his or her designee, trained in Title IX compliance, should monitor fundraising activities, especially if there are independent fundraisers occurring to ensure equal benefits.

Activities of Chance

Other creative ideas for schools and organizations to raise funds are based on games or activities of chance, including raffles, casino nights, and auctions (traditional or silent). Each one of these activities is moderately efficient in raising funds because they have little overhead, and a larger percentage of the profits can be returned to the school group. Often, donation of items or volunteering time to manage the activity is all that is required to conduct the activity, so the cost or payment of materials is significantly reduce. However, inherent in each activity is a wagering component, which may be strictly regulated by state or municipal law. Nonprofit groups that sponsor these events may find, due to the way they are managed, that laws not directly related to gambling may be violated, such as workers' compensation, the Freedom of Information Act, and becoming a public body by legal definition (Maybank & Hampton, 2014). School officials must be alert when school or school-related groups use activities of chance as fundraisers due to the additional regulations that control these activities irrespective of the use as a nonprofit fundraiser.

Raffles

School groups or booster clubs frequently use raffles as fundraisers, in large part, due to the ease at which they can be implemented and the ability to raise money efficiently. While variations exist, a general definition of a raffle is

an event for which raffle tickets are sold, a winner or winners are determined either by randomly selecting stubs from all of the raffle tickets for an event or by an alternative method that is approved . . . and at which a preannounced prize is awarded. (Traxler-McCauley-Law-Bowman Bingo Act of 1972, § 432.101(e))

Using a raffle, like a 50/50 raffle, at an athletic event seems relatively uncomplicated as tickets are sold, money is collected, and a winner is drawn before the contest is over sharing a portion of the pot with the group conducting the fundraiser.

Forty-six states and the District of Columbia permit raffles and have enacted nuanced legislation governing them. Organizations sponsoring raffles may be required to file an application with the state, county, or city and may need to apply several days prior to the event to process the application. Some state raffle laws limit the number of raffles a tax-exempt organization can hold. Other states have laws about the value of prizes awarded, the format of tickets, and other aspects of the raffle.

When permitting raffles as fundraisers, school administrators should be aware of the following:

- Be cognizant that raffles are typically monitored by state law;
- Ensure that groups or organizations are aware of items they may be required to comply with in order to conduct a fundraiser;
- Apply for licenses if required by state, county, or local law.

Casino Nights

Charity-sponsored casino nights are a fundraising activity in which schools organize an evening of various games that are similar to those found at a casino. Volunteers manage games such as blackjack, poker, craps, Texas Hold'em, and roulette. Depending on the state and local locations, it may be necessary to apply for permits to conduct the event. Certain states may require the organization conducting the casino night to place the permit approval number on all flyers and advertisements noting approval. In contrast to real casinos, actual gambling does not typically occur, and the funds raised are collected solely by an entry fee. Some government entities have increased their concern and oversight of charity-sponsored gambling activities, likening the entry fee as a payment for gambling, which may be illegal (Milbourn, 2005). For instance, prior to 2014, South Carolina had two legal forms of gambling, bingo and the state-run lottery. Virtually all other forms of gaming or gambling were either specifically banned by criminal statutes or were considered an unlawful lottery and were prohibited by the state (Maybank & Hampton, 2014). Charity-sponsored gambling activities have potential to be lucrative, but many pitfalls may exist, which need to be carefully analyzed by a prudent and forethoughtful school official prior to the event.

Recommendations for Managing a Casino Night

- Become aware of any state or local laws that regulate gambling activities—in many states as long as people don't win money, there's no problem;
- Apply for all permits and comply with regulations at the state and local level. This may require investigation into alcohol permits even if the organization does not intend to sell alcohol;

- Place the permit number on any flyers and publications for the event;
- Only charge for entrance into the activity. No actual gambling should occur;
- Research the website <http://www.gambling-law-us.com/Charitable-Gaming/> to identify each respective state's gambling laws pertaining to charitable organizations.

Auctions

Auctions provide another opportunity for schools to fundraise by gathering items and coupons for services, or receiving donations, and selling the donated goods and services to the highest bidder. The items a school group collects may come from the school itself. If so, the school district may have enacted board policy that regulates whether school equipment must be declared as “surplus equipment” before the school can permit groups to sell school equipment (Polk County, 2016).

Recommendations for Managing an Auction

- Declare that all sales are final—there will be no exchanges or refunds;
- All items are “as is.” Item descriptions should clearly explain what is included with each item;
- The school is not responsible for the correctness of descriptions, genuineness, authorship, provenance, or condition of the items;
- No statement made shall be deemed a warranty, representation, or assumption of liability;
- The auction item value listed is an estimate of fair market value;
- Restaurant certificates do not include alcohol, tax, or gratuities, unless specified;
- If bidders are seeking a tax donation, they should consult their tax adviser.

Food Sales

A time-honored activity to raise additional monies for curricular and extracurricular activities is a food sale. Images of children in front of local businesses selling homemade cookies and cupcakes in hopes of raising enough funds to sponsor a field trip or purchase equipment is quite common for school curricular and cocurricular programs. School booster organizations use school facilities to enhance their fundraising by using kitchen space and selling food at various school events such as athletic contests. Selling candy, pizza, and hotdogs to patrons appears to be a symbiotic and innocuous activity. However, in the past several years, regulations regarding nutritional content and state food preparation guidelines have created restrictions on the liberties to conduct food sales as fundraisers.

Adhering to Nutritional Guidelines

Nationally, improving nutritional content of food sold on school premises has been a high priority of the federal government (McNeil & Quillen, 2010). In response

to increasing child obesity rates, the federal government, through the United States Department of Agriculture (USDA) National School Lunch and Breakfast program, mandated new rules for competitive foods and beverages effective July 1, 2014 known as “Smart Snacks” (Geier, 2015). Competitive foods are all foods that are sold in the areas of the school campus where students have access during the school day (midnight before the school day to 30 minutes after class ends). The sale of food items does not apply during nonschool hours, on weekends, and at off-campus events. The Smart Snacks rules provide the option for states to create an exemption for the number of fundraisers allowable at school involving food and beverage items that do not meet Smart Snacks nutritional guidelines. Pursuant to guidelines established by the USDA under the Healthy Hunger-Free Kids Act (Smart Snacks), the 2010 federal law established rules that took effect in July 2014 to cover bake sales and other food fundraisers held during the school days as well as snacks sold in school vending machines, school stores, and onsite cafes. Fundraisers conducted outside school hours, or foods sold to be consumed at home, such as frozen pizzas and buckets of cookie dough, are not affected by the changes. The regulations provide a special exemption for infrequent fundraisers that do not meet the nutrition standards. State agencies may determine the frequency with which fundraising activities take place that do not meet the nutrition standards (Child Nutrition Act of 1966, (amended 2010)). Twenty-five states have enacted exemptions for fundraisers that do not meet the nutritional standards of the USDA’s Smart Snacks Standards. Some states passed legislation because of their consternation of the perceived federal overreach in education (Douglas 2015; Washington, 2014), whereas other states approved exemptions in response to decreased revenues for fundraising activities or nutritional standards (Fox, 2015; Pemberton, 2014).

The Use of School Facilities for Food Preparation

Groups who wish to prepare food on campus for fundraising activities have the potential of incurring state health code regulations that provide direction or prohibition for the use of school facilities to prepare food. This can affect concession stands and fundraising meals. Some states, through health code laws, restrict the use of a food establishment to licensed personnel. Variations exist among states as to how a food establishment is defined, but some elements are consistent. State laws and regulations generally describe a food establishment to be an operation where food is processed, stored, and offered for sale. This operation can be permanent or mobile and often includes food concession areas. States may require these groups to obtain a license to operate a food fundraiser in public schools or other areas, which may require trained personnel to be present while the activity is being conducted. Therefore, public school administrators must be cognizant that without licensed personnel, the school may be liable if injury were to occur or state health departments became aware of negligence.

Recommendations for Avoiding Food Sale Violations

Items important for administrators to be aware of are

- The Smart Snacks guidelines and whether the state has established exemptions from those guidelines;
- Ensure that groups engaging in food fundraisers are aware of board policy and building guidelines;
- If the group is requiring the use of food preparation areas that all health code regulations are being followed;
- Using a food preparation area may require a staff member certified in food preparation to be on site. This may require an additional charge to the group using the facility.

City Ordinances

Recognizing that each municipality enacts laws to guide its citizenry, the application of these laws needs to be acknowledged and understood by school officials as to how it affects students. In some instances, school activities permeate outside the auspice of the physical confinements of the school. So, as students are encouraged to engage the community in various fundraising activities, it is vital for advisors, sponsors, coaches, and most important, building administrators to know and understand local ordinances, and how these ordinances may restrict students selling goods and services in the community.

How Local Ordinances Affect Student Participation in Fundraisers

While all locales throughout the nation have variations of laws governing children, the State of Michigan is used as an example. The authority of the state over the activities of children is broader than its authority over adults. In Michigan, the state and political subdivisions may not prohibit adults from selling religious literature on the streets. The scope of authority over children reaches beyond the scope of authority over adults, and a city may lawfully prohibit children from selling religious literature on the streets (*People v. Ciocarian*, 1947). Detroit's Street Trade Ordinance further amplifies this paradigm. The words "street trade" shall mean the business, occupation, undertaking or pursuit of

- Distributing, selling, or offering for sale, goods, wares, merchandise, newspapers, magazines, periodical, advertising matter or any other printed or written material;
- Soliciting subscriptions for newspapers, magazines, or periodicals;
- Soliciting funds or anything of value for any purpose when conducted in any street, alley park, square, or other public place or in the lobby or entrance of any building frequented by the public or conducted by house-to-house canvassing (Detroit Code of Ordinances, 2011).

Furthermore, restrictions are present that regulate the age and time restrictions of children engaging in street trade:

- No minor under twelve (12) years of age shall engage in any street trade;
- No minor under seventeen (17) years of age shall engage in any street trade between the hours of 8:00 p.m. and 5:00 a.m. (Detroit Code of Ordinances, 2011).

Cities, villages, and townships in Michigan do not enforce local ordinances in a congruous fashion. School administrators should not assume consistent laws or consistent enforcement among localities. It is imperative for a school administrator charged with oversight of a building to become familiar with local ordinances affecting students and ensure fundraising policies are in compliance.

Ideas for Avoiding Violation of Local Ordinances

- Work with local law enforcement to understand ordinances controlling minor presence in the locale and how it is enforced;
- Train personnel conducting fundraisers in the ordinances of the locale;
- Develop policies for fundraising activities that ensure compliance with local ordinances.

Copyright Infringement and Its Impact on Fundraisers

Visual productions, such as movies, are quite common for curricular and extracurricular activities to use for a fundraising activity. In the current era, acquiring movie productions are quite simple. Whether purchasing a movie on compact disc, the Apple Store, Netflix, among others, the opportunities to access films are plentiful. This can be a good tool for educators—employing video replication of curriculum taught in class can be an effective pedagogical technique.

The use of movies has also permeated school-sponsored teams or clubs as they show movies and charge a fee for admission to raise funds for their respective group. However, using movies in non-educational means to raise funds encroaches on copyright protections due to three elements of copyright law: (a) instructional use, (b) fair use, and (c) licenses.

Instructional Use

The 1976 Copyright Act is the main body of law governing copyright in the United States (Title 17 of the U.S. Code). The law defines copyright and copyrightable works, details the exclusive rights granted to a copyright owner and the terms of copyright protection, and codifies the fair-use defense to copyright infringement (Copyright Act, 2011). Copyright law eases restrictions for people using protected works for

educational purposes (Bell, 2003). Teachers are allowed to show video recordings to students in a classroom setting for instructional use under the following conditions:

- the work must be shown by the instructor or pupils;
- the instructor and pupils must be in the same place or room;
- the work must be shown for an instructional purpose, not recreation or entertainment;
- the work must be shown as part of a class activity offered by a nonprofit educational institution;
- the work must be shown in a classroom or area used for systematic instructional activity;
- the copy of the work displayed must have been legally made and purchased. (Copyright Act, 2011).

Educators may use portions of videos and movies acquired lawfully as teaching tools but only in support of curriculum-based instructional activities at educational institutions.

Fair Use

Copyright law also allows selected portions of video recordings to be used in the classroom for criticism, comment, news reporting, or research without permission if the use can be considered “fair use.” Fair use is “a reasonable and limited use of a copyrighted work without the author’s permission” (Garner, 2010, p. 529). Fair use is a defense to an infringement claim, depending on the following statutory factors:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- nature of the copyrighted work;
- amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- effect of the use upon the potential market for or value of the copyrighted work. (Copyright Act, 2011).

Noteworthy for school administrators is the fact that no concise definition for fair use has ever emerged in spite of the fact that courts have considered and ruled on the fair use doctrine. Since the doctrine is an “equitable rule of reason, no generally applicable definition is possible, therefore each case raised must be decided upon its own facts” (Copyright Act, 2011).

Using Videos for Fundraising Events

Fundraising activities sponsored by teams and clubs using motion pictures or videos cannot be construed as an educational activity, which would permit an exemption

under fair use or instructional use. “Movie nights” are a recreational activity in which the sponsoring group intends to use motion pictures to entice individuals to pay an entry fee in exchange for entertainment. Since no educational value is inherent in this type of activity, it is an infringement of copyright rights without the purchase of a license. For those not familiar with copyright law, it is possible that an infringement could occur without malicious intent. Sponsors, advisors, and coaches might be inclined to approve such activities with the impetus being enhanced resources for students. This assumption is erroneous, and if permitted to occur, the action could place the school in jeopardy of legal action.

Ideas to Avoid Copyright Violations for Video Fundraisers

In order to mitigate potential copyright violation, school administrators should do the following:

- Become acquainted with copyright law;
- Do not assume that your use of copyrighted material is permissible without consulting the accompanying guidelines—Get permission;
- Train staff members. Many educators have a misconception of the fair-use doctrine that unintentionally causes them to violate copyright laws;
- Be aware of board copyright policy and ensure staff are aware of the policy;
- Do not ignore “cease and desist” communications. Take immediate steps to remedy the infringement and communicate that action to the infringed party (Bell, 2003, p. 57).

Discussion for Practical Application

By nature of the points raised in this article, it would seem that the process of sponsoring fundraising activities is so wrought with pitfalls, that school administrators would approve very few of these types of activities for fear of legal repercussions. Fundraisers have always been a quintessential activity for students who belong to a team or club to build *esprit de corps*—taking responsibility for the finances of an organization can be helpful and rewarding. The vision of students peddling some type of product or service in the quest to improve their cocurricular experience is often met with the sentiment that the students are working hard to take responsibility for their enhanced learning opportunities. Overall, students, and the groups and organizations that sponsor them, are encouraged to raise funds external of resources allocated directly from the school to provide the best experience possible. Conducting fundraisers was as simple as selling a good or service and collecting money. The voluminous laws, regulations, and case precedents have established a jurisprudential nexus in public schools. Thus, issues once seen as divorced from fundraising activities, like food nutritional guidelines, are now instrumental in providing guidance as to what may be sold.

While it is nearly impossible to predict all liability issues that may confront a school as it engages in fundraising activities, there are proactive actions school administrators

can implement in attempt to forecast legal concerns, which have the potential to legally expose individuals or the school. School districts and buildings need to establish policies and procedures that reflect current law. The policies should establish systems that, when complied with by a club, group, or team, will mitigate legal exposure to individuals or schools. As was highlighted in the section on torts, negligence is an arduous aspect of law to navigate for school administrators due to the multitude of situations that can arise—predicting every situation is impossible. Yet, no court would assume that schools could predict every negligent situation. Enhancing the skill of foreseeability within the legal paradigm of the reasonable person standard is what school administrators need to impart on those directly supervising fundraising activities. Therefore, continual training for sponsors of these activities is imperative. Establish and adopt sound policies and procedures that brings under the auspice of the school the most groups and organizations possible. Clarify with outside groups the relationship with the school, and if possible, make those outside groups a part of the school community. Encourage school-wide booster clubs so that inequities, especially gender, are minimized.

Just because a group is external of school control does not mean it does not create a disparate benefit. Lastly, sagacious leaders of school districts will procure appropriate insurance to indemnify those who lead fundraising events and could be held liable for activities that violate the law or are negligent—even though their intent is not malicious. Fundraising activities can be fun, helpful, and build cohesiveness among its members, but it is the thoughtful leader that will foresee potential legal conflict and avoid it before it ruins the event. While a school administrator has a multitude of activities occurring that he or she is charged with overseeing, and fundraising activities that have various components, he or she should never claim ignorance as a reason for not complying with the law.

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Notes

1. “Of relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent” (Garner, 2010, p. 674).
2. “The state must establish that it has a compelling interest that justifies and necessitates the law in question” (Garner, 2010, p. 1224).

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