

## MSBO Annual Conference 2023

### Booster Clubs and Support Groups: Limiting Potential Liability

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## Caution

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## GASB 84 Impacts

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## Historical Overview

### Historically

- Booster clubs were found primarily in high schools with a focus on athletics
- PTAs and PTOs raised funds for K-8 programs
- Such organizations relied upon the school district to hold/account for funds

### Changing Times

- Due to lack of funding, increased parent involvement and other factors, there has been a significant increase in parent support groups (both primary/secondary)

### Current Approach

- Parent support groups operate as separate legal entities (typically non-profit corporations)
- Most Michigan public school districts use student/district activity funds on a limited basis
- And Now . . . GASB 84

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## Fiduciary Funds under GASB 84

GASB defines four different types of fiduciary funds:

1. ~~Pension and other employee benefit trust funds~~
2. ~~Investment trust funds~~
3. Fiduciary funds
4. Private-Purpose Trust Funds

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## Private-Purpose Trust Funds

While terms used interchangeably, "Trust Funds" are distinguished from activity funds . . .

\*Not from a parent group or student activity

\*Funds/assets come from a gift, donation or bequest from an individual or a foundation/ charity

Pre-GASB 84: district responsible for expending funds per the request or purpose dictated by the donor

Under GASB #84: such funds must have a "qualifying trust agreement" as defined by GASB 84

-A written agreement

-Funded (i.e. assets transferred into the Trust)

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## Private-Purpose Trust Fund

- Definition:

*The assets are for the benefit of individuals and the government does not have administrative involvement with the assets or direct financial involvement with the assets. In addition, the assets are not derived from the government's provision of goods or services to those individuals*

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## Recharacterization Process

- Is there a written trust agreement
  - No trust agreement = No trust
- Does the district have administrative involvement?
  - No private-purpose trust
- Is the District the beneficiary?
  - No private-purpose trust
- Consider transfer to a community foundation or education foundation – if allowed
- Contact the donor to address/correct issues
- Return the funds
- Convert it to a public-purpose trust

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## “Externalize” Support Groups

- Compliance with GASB 84 might be the opportunity to move support group accounts out of the district's financial orbit
- Do all of the booster club's expenditures have an educational nexus? Are they authorized under the RSC?
- District likely has administrative involvement if the accounts are held internally
- District is the beneficiary – not a Custodial Fund

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## Consider Board Policy External v Internal Support Groups

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## Revise Board Policy

- Eliminate references to Student Activity Funds
- Review for administrative control that may undermine intended Custodial Funds
- Review each policy that references support groups
- Create 2 clear paths with rules
  - Internal
  - External

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## Board Policy Review/Update

### Existing Board Policies:

- |   |   |
|---|---|
| 1. Student Activity Funds   | 11. Student Groups  |
| 2. Booster Clubs (or Parent Organizations)                              | 12. Parent Organizations                                      |
| 3. Fundraising  | 13. District Support Organizations                            |
| 4. Online Fundraising   | 14. Trust and Agency Fund                                     |
| 5. Student Fundraising  | 15. Relations with Educational Institutions and Organizations |
| 6. Crowdfunding   | 16. Relations with Special Interest Groups                    |
| 7. Gifts, Donations and Bequests  | 17. School-Based Support Organizations                        |
| 8. District-Sponsored Clubs and Activities                              | And more . . .  |
| 9. Equal Access for Nondistrict-Sponsored, Student Clubs and Activities |   |
| 10. Student Fundraising   |   |

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## Board Policy Review/Update

### Simplified Board Policy Approach:

1. Gifts, Donations and Bequests
2. Custodial Funds
3. Support Organizations (e.g. Booster Clubs, PTOs)
4. Fundraising

Remove administrative control if intent is to create Custodial Funds

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## Thrun Approach

### Board Policy 3106

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## Practical Considerations

1. Communicating with building level staff
  - “Flower Funds” and individual accounts still acceptable – just not in the district umbrella
  - May not co-mingle with governmental funds
2. Develop administrative guidelines and communicate new rules with staff
3. Communicating with parents/informal groups or clubs
4. Communicating with Booster Clubs, PTOs, *etc.*
5. Be prepared for “it is our money...”

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## “Helping” the Externalizing Process

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## Booster Clubs and PTOs

- Separate legal organization structured by parents or community members
- Board Policy should be updated and clarify that such groups are separate from the school district
- Board Policy should also set guidelines for working with these groups
  - Recognition
  - Information gathering
  - Rules

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## Booster Clubs and PTOs

- Board Policy Recommendations:
  - Booster Clubs/Support Groups do NOT carry the authority of the school district
  - They may request donations (as a non-profit entity)
  - May not hold themselves out as an “agent” of the District
- Use simplified board policies, specific administrative guidelines
- *Implement and adhere to policies/procedures*

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## Booster Clubs and PTOs Practical Guidance

- Provide guidance . . . NOT legal advice
- "Guidance" may include:
  - A handout as to useful information
  - How to set up a separate legal entity (i.e. link to State of Michigan, LARA site)
  - How to obtain an "EIN" or tax identification number (i.e. link to the IRS website)
- Consistently refer to Board Policy and District expectations
- Be clear that the District *may* limit activities (or prohibit them on school premises) for non-compliance
- Funds deposited with the District are a "donation" to the District and subject to the law application to public school districts (bidding, permissible expenditure limitations)

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## Parent Organizations: Resolving Conflicts and Fallouts

What Actions Can the School District Take if a Parent Organization Will Not Comply with Board Policy?

### Permissible Actions:

- Prohibit the use of the school district's name.
- Prohibit fundraising or soliciting contributions from students on school property or at school events.
- Ban such clubs from operating on school premises.
- Issue a public statement that the district is not affiliated with such group.

### Not Permissible:

- Dissolve a separate legal entity formed by such a club through the State of Michigan.
- However, the actions above would render the organization unable to complete its purpose and expose the district to liability

**\*\*Check board policy prior to taking actions\*\***

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## A Little on Lawful Expenditures

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## Just for the Legality of it

1. Is the district authorized to make the expenditure?
  2. Is the expenditure specifically prohibited?
    - No alcohol, golf, illicit drugs...
  3. Is the expenditure appropriated in the district's budget?
    - Is it approved and consistent with board policy?
- Mich Constitution Article IX, Section 18
  - Public school districts have broad "general powers" under RSC Section 11a
  - RSC Section 1814 prohibitions and exceptions

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## Legal Liability & Booster Groups

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## The BAD

- The school district/Board of Education is the "line of authority"
- The District has the legal authority and is required by law to maintain control over district offered programs, its students and staff and its facilities at all times

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## The Line of Separation

### School District Authority

#### Authority over Support Groups\*:

- The School District may not control what is in the bylaws or other governing documents
- May not directly control its books/records, spend funds collected (unless the support groups donates the funds to the District)
- May not demand the dissolution of a separate non-profit

\* NONE

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## The Line of Separation

### Parent Support Group Authority

- Support groups control their own operations, governing documents and the control of funds collected
- Booster clubs, PTOs and other parent support groups are NOT authorized to:
  - *make decisions/demands related to coaches, staff or parents*
  - *advise parents/students that requested funds are "required"*
  - *demand certain actions or contributions in order to participate in a program*

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## Best Practices

- Have Board Policies and Administrative Guidelines in place that follow the guidelines covered
- Require booster clubs to review/acknowledge the Board Policies and guidelines for operation on school property
- Educate staff, including principles and athletic directors, on such policies for operating with booster clubs and other support groups

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## Best Practices (cont.)

- Require clubs provide copies of governing documents, tax identification number (EIN) or other required documents in order to operate on school premises *however . . .*
- Provide notice that the School District does not review or advise on such documents
  - Do not provide legal/accounting advice*
- Can provide a list of resources to support groups, but do not provide legal/accounting advice

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## Limiting Liability for Parent Support Group Activities

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## Setting Boundaries: the "Agency" Concept

- "Agent" is generally defined as one who represents and acts for another (under a contract or based on an existing relationship)
- Parent Support Groups are not agents of the school districts
- School districts may not have "deemed agents"

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## Torts and Criminal Actions

### "Tort"

A wrongful act other than a breach of contract for which relief may be obtained in the form of damages or an injunction

### "Crime"

An illegal act for which someone can be punished by the government; especially a gross violation of law

*Merriam-Webster*

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## Torts

- Booster and Parent Clubs members may be held liable for negligent acts
- School District may be held liable for acts committed by Booster and Parent Club members *if indistinguishable* (alter ego theory)
- Governmental immunity may be lost for propriety function

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## Example: Tort Claim Against District

- Two individuals attended a "Las Vegas Night" sponsored by the athletic boosters
- Following the "Las Vegas Night" events they went to another bar
- Upon return to the decedent's home an argument ensued and the second individual shot the decedent then later killed himself

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## ***Kerry v Turnage,*** **154 Mich App 275 (1986)**

- Plaintiffs argued school district may be held vicariously liable for its agent, the athletic boosters, in the alleged violation of the Dram Shop Act
- The court found a question of fact existed whether an agency relationship existed between the athletic boosters and the school and remanded the case for a trial on its merits

*Kerry v Turnage*, 154 Mich App 275 (1986)

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## And this...

- Booster club holds Las Vegas Night
- Gets swindled by gaming operator
- Separate legal existence of boosters keeps district from involvement

*Botelho v Griffin* (AK, 2001)

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## ***Good Cheer***

- High school hosts private cheer competition
- Cheer entirely funded by Boosters
- Mother of participant trips and falls
- Boosters found to be a separate entity from School District
- School District not liable for injuries

*Brabson v Floyd County Bd of Educ*, 862 F Supp 2d 571 (ED Ky 2011)

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## More Examples of Potential Liability . . .

The Charitable Organizations and Solicitations Act, MCL 400.421, *et seq*

- Can't direct funds for purposes to organization for which not solicited
- Can't solicit funds under false pretenses
  - *Can't divert funds solicited for a particular purpose*
- Can't aid, abet or *permit* any such unlawful conduct

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## More Examples of Potential Liability . . .

Penalties under the Act:

- Civil fine up to \$10,000
- Criminal fine up to \$20,000
- Up to 5 years imprisonment
- Restitution, costs, and attorney fees

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## More Examples of Potential Liability . . .

- Anything involving sports or music
- Anything involving alcohol, cars, gambling, and sex
- Persistent amnesia about *Kerry v Turnage*

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## Title IX Considerations (or: Boosting the Threat Level)

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## Title IX

*"No person in the United States shall, on the basis of **sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . ."*

20 USC § 1681(a)

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## Title IX Regulations

*"No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural **athletics** offered by a recipient, and no recipient shall provide any such athletics separately on such basis."*

34 CFR 106.41(a)

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## Title IX – Avoiding Issues

- Interscholastic sports, benefits, services, and opportunities overall must be *equivalent* for male and female athletes, *regardless of funding sources*

OCR Docket No. 09-91-1222

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## Title IX – Avoiding Issues

- No obligation to direct privately raised funds  
-BUT-
- Cannot skirt equal opportunity requirements under the guise of favored outside funding

*Chalenor v Univ. of N. Dakota*, 291 F3d 1042 (2002)

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## Title IX – Avoiding Issues

Financial “hot button” issues:

- Equipment and supplies
- Travel and per diem allowance
- Locker rooms, practice, and competitive facilities
- Medical and training facilities and services
- Assignment and compensation of coaches

34 CFR 106.41(c)

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## Practical Thoughts

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## Questions in the last year....

- Booster group is paying our coaches?
- Booster group is trying to dictate equipment that is purchased?
- Booster club is contacting administration too much?
- What leverage do we have?

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## Questions?

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