

## Where's the Money?

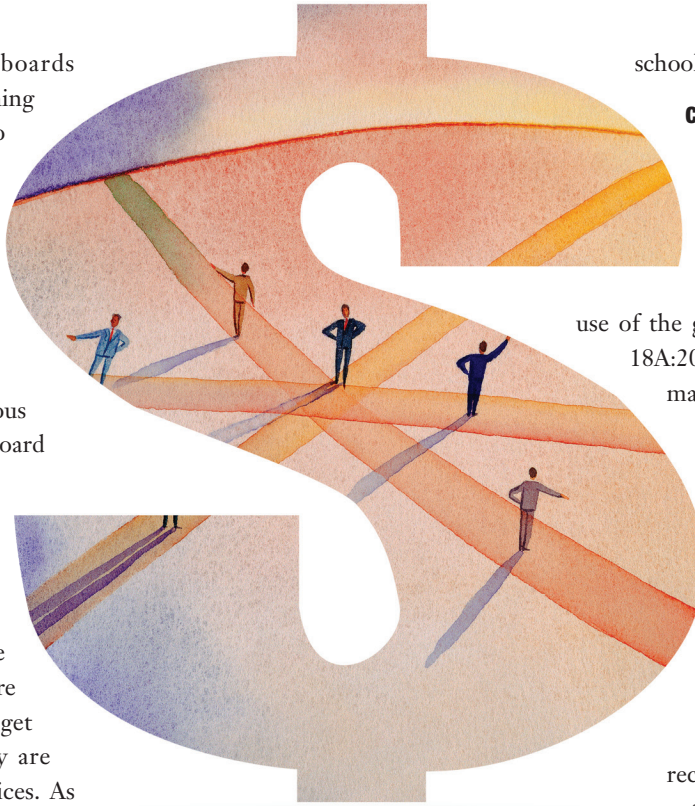
The search for alternate sources of financial support

By JONATHAN M. BUSCH, ESQ.

More than ever, school boards throughout New Jersey are searching for alternate sources of funding to help offset the costs of student extracurricular activities and other programming in their school districts. Last spring, reports of significant cuts in state public education funding for the upcoming 2010-2011 school year resulted in many long and arduous school board meetings. School board members were faced with difficult choices, including possible cuts to, or the elimination of, extracurricular student programming such as sports teams, student organizations and clubs. While school districts received a little more in state aid for the 2011-2012 budget year than the current year, they are still facing difficult financial choices. As a result, school boards facing cuts to extracurricular student programming should consider a variety of ways that they may accept money from alternate sources for the purpose of maintaining student programming.

Note that school boards may not pay for core educational programs through alternative financing means; only extracurricular and "enrichment" type programs are permitted to be financed outside of a district's basic budget.

**Fundraising** Student organizations and parent groups within particular school districts may raise funds for the purpose of supporting extracurricular student programming. Some student-run groups or sports programs, for example, may need to raise money for the purpose of maintaining or restoring programs. Student fundraising efforts, including those initiated by



parent or outside organizations, are usually subject to procedures contained in an individual school board's pupil fundraising policy. School boards should consider the adoption of policies and procedures that are designed to encourage, yet closely monitor, student fundraising activities. School boards with existing fund raising policies and procedures should carefully review them for possible amendments, where necessary. A good example of a fundraising policy can be found in the New Jersey School Boards Association's *Critical Policy Reference Manual* at File Code 5136, titled "Fundraising Activities." As with all policies, every school board should review its fundraising policy to ensure that it reflects that particular

school board's goals and priorities.

**Contributions** School boards are permitted to accept contributions, including those made possible by fundraising efforts, pursuant to the acceptance and use of the gifts law found at *N.J.S.A. 18A:20-4*. Although some donors may want their contribution used for a specific purpose, the school board must be able to use the proceeds of a particular contribution in any manner it deems appropriate. It is essential for a school board to maintain a policy and procedure governing its process for the receipt of contributions—and that donors are aware of the policies.

**Education Foundations** Contributions to school boards are often made possible by local education foundations. Education foundations are wholly independent from their local school boards but operate as partners. Their financial contributions are made possible by fundraising by the foundations' members. As education foundations are private, non-profit corporations, which are often exempt for federal income tax purposes under 501(c)(3) of the Internal Revenue Code, donor contributions to the education foundations are often eligible for the maximum allowable federal tax deductions. Such a benefit is not available to a donor who has made a direct contribution to a school board.

It is especially important in these

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economic times for communities to weigh the benefits of establishing education foundations. In the event that an education foundation already exists in a particular community, residents should consider whether they are maximizing the benefits of their education foundation. A school board with an education foundation could encourage its district residents to make tax-deductible contributions to their education foundation which could, in turn, make contributions to the school board.

**Advertising** A school board may consider permitting third parties to advertise on its property in exchange for payment. In accordance with *N.J.A.C. 5:34-9.4(b)3*, the right to use public space or facilities, including but not limited to scoreboards and athletic facilities, for advertising in exchange for fees or services, or discounts on services, is considered a concession. The Public School Contracts Law, *N.J.S.A. 18A:18A-1 et seq.*, defines a concession as:

[T]he granting of a license or right to act for or on behalf of the board of education, or to provide a service requiring the approval or endorsement of the board of education, and which may or may not involve a payment or exchange, or provision of services by or to the board of education, provided that the term concession shall not include vending machines.

A concession is subject to the statute only if it is awarded to a for-profit organization. A concession may be awarded by a school board only after receipt of informal quotations, receipt of public bids or through competitive contracting. While the school board may ultimately grant a right to a third party to advertise on its property, the school board must follow a series of procedures. The process will ensure that the school board

awards the concession to the responsible bidder with the price that is most advantageous to the school district.

In the event that the local school board wants to allow a third party to advertise on its property, the board would be required to obtain an opinion from its counsel as to the legality of procuring the concession and would need to pass a resolution authorizing the procurement of the concession. In accordance with *N.J.A.C. 5:34-9.4(d)2*, the resolution must include the following information:

1. A description of the public need to award the concession;
2. The concession to be awarded;
3. The considerations, including the benefits and any risks the school board took into account in reaching the decision to award the concession;
4. An estimate of the total value of the concession;
5. An estimate of any revenue or services to be received by the school board, if any;
6. The basis for award of the concession which could be the most advantageous price and other factors, or the lowest responsible bidder;
7. An estimate of any costs to be incurred by the school board as part of the concession;
8. Any services, facilities, or endorsement to be provided by the school board; and
9. The method to be used to procure the concession, such as by informal quotations, public bidding or competitive contracting.

School boards may consider awarding other concessions for the purpose of raising money as well. In particular, *N.J.A.C. 5:34-9.4(b)* describes other licenses or rights which may be awarded by a public entity in exchange for a payment or other remuneration. For example, school boards are permitted to award the right to:

- Publish a map, newsletter, directory, or calendar containing the meeting schedules and other information about school board services;
- Install “welcome” signs on school

board property; or

- Sell goods or services on school board property.

Additionally, as of January 5, 2011, pursuant to the enactment of P.L.2010, c. 121, a school board is permitted to sell advertising space (excluding advertisements for tobacco products, alcohol products or political advocacy) on the exterior sides of school buses owned or leased by the school board. Half of the revenue generated from the advertisements is required to be used to offset transportation fuel costs and the other half may be used to support programs and services deemed appropriate by a school board.

While the process for the ultimate award of a concession may be cumbersome, it is intended to ensure that each public entity maximizes the value of every concession awarded.

**Activity Fees** School boards may wish to consider raising funds through the adoption of a “pay for play” program. “Pay for play” is a term that commonly refers to the practice of requiring students and their parents/guardians to pay for participating in clubs, sports or other programs in a public school. There is no express prohibition on charging students for their involvement in extracurricular activities. Thus, a school board may wish to charge its students for their participation in activities or programs.

However, the school board may not charge students to participate in an educational activity or program that is considered “integral” to classroom instruction. In fact, it is well settled that the school board may not charge students for their participation in an activity that is mandatory for the completion of the classroom curriculum. For example, in *Parsippany-Troy Hills Educ. Ass’n v. Parsippany-Troy Hills Bd. of Educ.*, the Appellate Division held that school boards could charge a fee for a non-mandatory, behind-the-wheel driver education course offered during school hours because it was not part of

mandatory curriculum. Additionally, in *R.H. o/b/o Pascack Valley Reg. Bd. of Educ.*, the commissioner of education upheld the determination of an administrative law judge that a school board was not required to pay for laptop computers because they are not an essential part of student education. There is no indication that participation in an extracurricular activity such as a club or a team sport would be considered mandatory or integral to a student's educational studies. It appears as if the school board may charge students for their participation in such an activity.

However, in the event that the school board decided to charge students for their participation in an activity, it must ensure that it does not preclude students who are unable to afford such fees. Pursuant to *N.J.A.C. 6A:7-1.4(a)2*, boards of education are required to "promote equal educational opportunity" without regard to, among other categories, socio-economic status. If the school board were to charge students for their participation in activities, it must find a way to permit the participation of those students who

demonstrate a financial hardship. In determining financial hardship, the school board may wish to consider applying the same standard as the statewide eligibility standards for free and reduced price meals under the school lunch program.

Although the fact that the law appears to permit the school board to charge students for extracurricular activities, an argument could be made that charging students for their participation in an activity violates the "thorough and efficient" clause found in Article VIII, Section IV of the New Jersey State Constitution. According to *N.J.S.A. 18A:7F-45*, part of the School Funding Reform Act of 2008, extracurricular activities are a component of the base per-pupil amount necessary for the purpose of providing each public school student with a free "thorough and efficient education." Although this constitutional argument is unlikely to be successful in view of the aforementioned case law distinguishing integral and non-integral activities, any party looking to challenge a school board's requirement that its students pay

for participation in activities is likely to challenge the school board on this basis.

Recent news reports reflect the fact that more school boards than ever appear to be requiring their students to pay for participation in activities. For example, according to an NJSBA poll taken in March 2010, more than 31 percent of public school districts were exploring plans to require their students to pay for their participation in sports in the fall of 2011.

It is important to note that legislation was re-introduced on September 13, 2010 to expressly ban "pay for play" in New Jersey schools. S-2228 proposes to specifically prohibit school boards from charging students a fee to participate in extra-curricular activities. The bill, sponsored by state Sen. Ronald Rice, has been referred to the Senate Education Committee and to date, no further action has been taken. sl

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