

LEADERSHIP  
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PRACTICAL PERSPECTIVES ON SCHOOL LAW &amp; POLICY

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## Surviving tough budget times, part two

In this, the second of two issues addressing school board challenges in the current economic crisis, *Leadership Insider* brings you updates and useful information that may affect your district. Elizabeth Eynon-Kokrda takes a detailed look at the impact of the federal economic stimulus programs on K-12 public schools. Montana School Boards Association Executive Director Lance Melton points out the benefits of self-funded insurance pools. And Forrest Jack Lance, general counsel for Georgia's Rockdale County School District, and Derek Bauer, partner, McKenna Long & Aldridge LLP, Atlanta, provide a "playbook" for schools facing the rising tide of potentially expensive trademark enforcement action.

## Negotiating the unexpected rapids of the federal funding stream

By Elizabeth Eynon-Kokrda, Partner,  
Baird Holm LLP, Omaha, Neb.

The American Recovery and Reinvestment Act of 2009 (ARRA) isn't quite two years old, yet its life is nearly spent. What has been its impact on education? And how do we move forward without it? ARRA included a surge of nearly \$100 billion dollars into the economy tied directly to education, 80 percent of which was reserved for pre-K through 12th-grade efforts. The Obama administration anticipated that this money would not only raise all boats, but also help school districts become innovators in closing the achievement gap.

In theory, the wide array of types of grants made available under ARRA appeared to be an enormous boon to education. In fact, the act unexpectedly yet unquestionably created pitfalls; harm to districts looms in its wake; and public school districts now must move forward cautiously.

### The State Fiscal Stabilization Fund

The largest single federal ARRA outlay aimed at education was provided to states. The State Fiscal Stabilization Fund (SFSF) was worth approximately \$48.3 billion. According to the U.S. Department of Education, its two primary goals were to maintain state funding through fiscal year 2011

at least at the level of 2008 or 2009 (whichever was greater), and to allow for the continued phase-in of prior-enacted state equity and adequacy adjustments to their school finance formulas.

Significant short-term funds were meant to sustain and improve education funding at the state level while boosting the economy. The applications issued by the federal government to states anticipated enough funding to provide them with more than they needed to balance education budgets, to be distributed to districts in addition to their formula allocations. This additional money was to be used for school innovation and improvement.

But that was not to be.

A preliminary analysis of the use of the SFSF in March 2010 by Michael A. Rebell, Jessica R. Wolff, and Daniel A. Yaverbaum concluded that every state they studied backfilled its level of state support. State dollars previously allocated to education were moved elsewhere, and federal dollars that were mandated to go to education were used to fill the freshly dug education holes. States intentionally left no surplus for districts. In fact, despite funding assistance for education, states continued to reduce funds to levels below what they promised when they applied for federal dollars.

In another analysis evaluating SFSF's

impact, David C. Sciarra, Daniel Farris, and Bruce Baker found that, despite assurances to the contrary, several states did not use the funds to restore K-12 formula aid up to actual 2008 or 2009 levels. Most states did not improve fairness in their formulas with the funds. Their evidence points to states using SFSF funds to implement aid cuts that disproportionately impacted higher-poverty districts.

Unfortunately, it appears that the SFSF program may have done more harm than good. In states that backfilled, education funding was cut radically without it being immediately obvious. Now a funding cliff looms that otherwise might not have existed. While ARRA as a whole helped state budgets stay afloat, now that ARRA will no longer be available for budgeting, it is education that faces the "hole."

### Title I and IDEA: Forced to be creative

The next-largest of the ARRA funding increases came via Title I (for economically disadvantaged students—approximately \$13 billion) and Individuals with Disabilities Education Act (for students with disabilities—approximately \$12.2 billion).

States could not tinker substantially with Title I and Individuals with Disabilities Education Act funding distribution to K-12 districts like they could with SFSF funds. Many districts, however, perhaps in part due to the cuts in regular education, have found ways to put these monies into the general funding stream rather than into

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## About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards and the school boards of the District of Columbia, Hawai'i, and the U.S. Virgin Islands. For more information, visit [www.nsba.org/na](http://www.nsba.org/na).

## About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join, provided they are members in good standing of their state school boards associations.

## About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for the exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

additional services for disadvantaged and disabled students.

While districts were being advised that additional funding in Title I and IDEA would provide an opportunity to implement innovative strategies, they also knew that, like SFSF, these were "one-time funds" to be used for one-time expenditures. It proved to be extraordinarily difficult to be innovative while also trying to weather state budget cuts, maintain jobs for current employees, and avoid an even steeper "funding cliff" by not adding more jobs or programs.

Schools reportedly drew down a relatively small proportion of their Title I ARRA funds during the first year of implementation, using the funds to retain jobs formerly paid for through state and local funding that otherwise would have been cut. Districts trying to find "one-time" expenditures quickly were pressured into purchases of, for example, software that didn't truly align well with curriculum, or one-time "programming" from local community groups that was far from essential. The impact of these purchases on student performance is inherently short-lived and not measurable.

IDEA ARRA funds were to be spent for the extra costs associated with providing free and appropriate public education to students with disabilities. Facing steep shortages of teachers qualified to provide special education services, districts found it difficult to spend the funds for strategic initiatives to reach more students through technology and training staff.

Some districts took advantage of their statutory authority to move IDEA funds into the general fund. Where district special education plans are in compliance with state rules, districts are permitted to reduce their state and local spending for special education by up to 50 percent of the amount of the federal increase they received. This funding can then go to cover the holes in regular education budgets. The lower local contribution will become the base figure used to determine future maintenance of effort requirements. This fundshifting, therefore, is likely to cause potentially significant reductions in special education spending.

## Areas for success

The ongoing budget juggling is fraught with peril. The Obama administration's Race to the Top program (RTTT) has not proven to be accessible for most states, and some say it exacerbates education funding inequities amongst states. Other federal funding sources require school districts to

engage in a form of coerced confession where, in order to stay whole, a district must cut itself apart.

School improvement grants, for example, became available when states, in order to receive their second installation of ARRA SFSF funds, were required to tag certain schools already labeled by No Child Left Behind as "in need of improvement" with the additional moniker of persistently low-achieving schools (PLAS).

In order to receive funds, a district must choose one of four options for a PLAS school: Fire the principal and half of the staff; close the school; charter the school; or fire the principal and implement other changes. The implications of these choices must be considered carefully, especially when the funds associated with the label are not truly enough to make the significant investment research shows is necessary to close the opportunity gap.

Despite this bleak landscape, avenues for success exist. Districts have been able to achieve long-lasting educational benefits and significant savings for taxpayers through the sale of ARRA-related bonds. A few districts have turned away from their use, but the general consensus is that the bonds have been effective. LA Unified was able to sell more than \$300 million in Qualified School Construction Bonds (QSCBs) in October of 2009. Meramec Valley R-III School District in Missouri sold \$4.1 million in QSCBs and over \$11 million in Build America Bonds, with an estimated savings to taxpayers of \$3.2 million.

The tax bill signed into law on December 17, 2010, includes a one-year extension of \$400 million in bond authority for zero-interest Qualified Zone Academy Bonds, but does not extend bond authority for Qualified School Construction Bonds (QSCBs) and Build America Bonds. (Check out NSBA's Legislative Action Center for up-to-date information on federal legislation that affects your school district: [http://vocusgr.vocus.com/grspace2/WebPublish/controller.aspx?SiteName=NSBA&Definition=Home&SV\\_Section=Home](http://vocusgr.vocus.com/grspace2/WebPublish/controller.aspx?SiteName=NSBA&Definition=Home&SV_Section=Home).)

Funds for state budgets that are still to be allocated in the upcoming fiscal year include the Education Jobs Fund—\$10 billion to be distributed to states by a formula based on population figures. States are permitted to distribute these funds to school districts based on their primary funding formula or districts' relative share of federal Title I funds.

The overriding purpose of the federal program is to ensure that teaching jobs are created and saved. Unfortunately, state gov-

ernments again are contemplating using the money to close overall budget shortfalls by reducing state education funding by the amount received from the federal government.

For example, the *Washington Post* reported in September that Arkansas Gov. Mike Beebe planned to use the state's \$91 million allocation to pay for capital projects by freeing up state money currently spent on teachers. Rhode Island, South Dakota, and Washington officials have said they plan to reduce state education funding by the amount received from the federal government.

The National Education Association has asked Education Secretary Arne Duncan to clarify that these diversions of funds are impermissible, and school districts across the country need to make their voices heard. Ensuring that Education Jobs funds are not used to make a deep hole even deeper may be critical to the overall survival of equitable education funding in many states.

Nearly every district now faces more financial challenges than two years ago. The American Association of School Administrators (AASA) in an April 2010

survey reported that 66 percent of members surveyed cut positions this school year and 90 percent expected to in the next school year. More than 60 percent anticipated raising class size, 34 percent were considering cancelling summer school, and 13 percent were weighing the possibility of a four-day school week.

Federal education policy is moving farther away from local decision-making, toward nationalized one-size-fits-all solutions. Navigating these dangerous waters will prove to be one of education's toughest challenges. ■

## Self-funded insurance pools provide relief

By Lance Melton, Executive Director, Montana School Boards Association (MTSBA)

Many state school boards associations across the country operate and/or are otherwise connected with a self-insurance pool of one kind or another. Some of the more traditional types of such pools include property and casualty, school board liability, workers' compensation, health insurance, and unemployment insurance.

Many of the pools were born out of necessity in the early to mid-1980s, created by school boards associations when few traditional insurance markets were willing to provide coverage for schools. James Sandner, president of Brokers' Risk, was one of the early leaders in the industry, having developed the first errors and omissions policy for trustees of self-insured pools in 1980.

Over the years, self-insured pools have expanded and have proven helpful to school districts in good and bad economic times. According to the Association of Governmental Risk Pools, there are more than 500 self-insured pools across the nation. Why have these pools survived and thrived over the years?

- Lower operating costs—Typical self-insured pools' operating expense ratios are 10 percent to 15 percent lower those of the private insurance market.

- No profit motive—Underwriting guidelines are set to cover expected costs of the program in a given year, without any profit motive.

- Investment income—Pools keep and invest member contributions until they are needed to pay claims and expenses, thus creating a stream of investment income back to the pool.

- Significant risk management services—Pools offer training and risk management that far exceed what is typically offered by private insurers.

- Savings from participation pays for state association dues—When dollars are tight like they are now, school districts have realized cost savings that often exceed the cost of membership dues in their state school boards association.

- Specialization—Creating risk management programs for similar entities leverages certain economies of scale, and focuses their impact on areas that really matter to the pool's membership in reducing costs.

### Trends in the market and today's financial crisis

Like many other businesses, insurance goes through cycles that make it easier or harder to purchase competitively priced products and services. In insurance vernacular, this is called a "soft" or a "hard" market. Think of a soft market as being a buyer's market and a hard market as being a seller's market. In workers' compensation, property and casualty, and school board liability markets, for example, we are currently considered to be in the middle of a soft market, where premium quotes can be very competitive. A soft market creates opportunities for private insurers to gain market share by providing low-cost alternatives to pooled insurance programs.

When these opportunities arise, it is important for a school district to analyze carefully the alternatives to ensure they are getting a full picture of their options. For example, the district may have a lower price quote that comes with a corresponding reduction in service or cover-

age. A district should make sure that it has an "apples to apples" comparison in weighing coverage options. In most cases, short-term savings, if any, are outweighed by the significant benefits of pooled coverage, including:

- Predictability of coverage—The pool provides the necessary coverage for school entities.

- Security—The pool provides a stable financial base and is able to pay claims over the long term for school district members.

- Stable pricing—The pool provides relative price stability for its members over time; premiums may go up and down, but not in dramatic shifts that are inconsistent with the general market place. Pools smooth out normal insurance pricing cycles by providing more gradual changes in premiums from year to year.

Self-sufficiency, local leadership, and pursuit of long-term financial independence were all critical reasons why self-insured pools gained a foothold in the competitive market place of insurance. These reasons also are why they will continue to thrive across the country long after the immediate economic crisis has ended. This is one of many ways that state school boards associations around the nation have expanded service to their members over the last 30 years. ■

*Special thanks to Shawn Bubb, MTSBA Director of Insurance Services, and Theresia LeSueur, MTSBA Director of the Montana Schools Unemployment Insurance Program, for their assistance and expertise in helping with this article.*

# Collegiate sports challenge schools with trademark claims

By *Forrest Jack Lance, General Counsel, Rockdale County School District, Conyers, Ga., and Derek Bauer, Partner, McKenna Long & Aldridge LLP, Atlanta*

Consider this hypothetical scenario: Ben Offguard, a school district superintendent, receives a letter from Collegiate Licensing Company (CLC), an Atlanta firm that represents about 200 universities on trademark issues. The letter says that the use of certain marks by the district's high school constitutes trademark infringement. CLC demands that the high school stop any further use of a specific university's name and mascot.

Offguard recalls the school's 20-year use of the current school name and mascot. It will cost the district a fortune to remove the name and the mascot that now appear on the football field, gym floor, school walls, stationery, uniforms, and spirit wear.

Unfortunately, this scenario is the very real opening salvo between high-profile Division I universities and high schools across the country. Several of the recent disputes have made national headlines. The stakes for both sides in these disputes are very high. The universities are risking the alienation of entire generations of future students and forfeiting their status as respected institutions of "higher learning." The school districts are faced with the choice of potentially expensive litigation or, in some cases, six-figure costs and incalculable political and constituent resentment that comes with eliminating historical school mascots.

The theory behind CLC's legal position is this: Universities have spent tremendous amounts of money building a brand. By using identical or nearly identical mascots and paraphernalia for school programs, high schools are weakening or diluting the colleges' ability to maximize the public's association of the mascots exclusively with the universities. High schools are therefore violating federal and state trademark infringement laws.

The basic elements of a trademark claim are as follows: ownership of an enforceable trademark or trade dress (color scheme), and likelihood of confusion caused by the challenged uses of the trademarks among the relevant audience. The definition of this audience is subject to dispute.

It is tempting to concede the strength and robust enforceability of the universities' trademarks. When asked, however, CLC said that there are no known cases supporting its legal theory against a school district

and no known evidence of actual confusion. In addition, secondary schools have substantial defenses to the types of claims being threatened by CLC.

First, given the widespread and historical use of well-known professional and collegiate mascots in K-12 athletics programs, it is unlikely any university can actually claim world-wide exclusive ownership of a common team mascot like the "Tigers" or the "Seminoles."

Second, no reasonable collegiate or high school sports fan who recognizes the mascots to be associated with a university would confuse a high school's use of the mascot/trade dress with a major university—and such confusion is the most essential element of any trademark infringement claim. Two federal courts found that the likelihood of confusion was low when the marks were used in dissimilar settings. These cases are: *Harlem Wizards Entertainment Basketball, Inc. v. NBA Properties, Inc.*, 952 F.Supp. 1084 (D.N.J. 1997) and *Illinois High School Ass'n v. GTE Vantage Inc.*, 99 F.3d 244 (7th Circuit, 1996).

Third, secondary school and university uses of identical logos and mascots have coexisted without measurable or identifiable confusion for decades.

Fourth, public schools are ideal beneficiaries of the "fair use" defense: They are public, nonprofit, educational missions that likely make no competitive or material commercial use of the trademark/dress at issue.

Fifth, often the mascots have been selected by the student body, not by the governing entity or board in an effort to brand or misrepresent the secondary school as part of a university.

Finally, depending on state laws, which vary by jurisdiction, other defenses such as sovereign immunity may be available.

## What to do?

Faced with a CLC threat, what can you and your attorney do?

First, do your homework. Confirm the challenged trademark and copyright registrations, as rights in unregistered trademarks and copyrights are generally considerably weaker than registered ones. Learn the history of the trademark/dress you are using. You may find that you are no longer using certain ones, or that you do not make commercial use of the challenged ones, or that the ones you are using are not identical to those sought to be enforced.

Determine the value of the mascot and logos to your district—how pervasive are they, and how much would it cost to

replace them?

Second, choose an option:

- Abandon the challenged trademarks, and absorb the financial and political costs. Some schools have made the situation a teachable moment. The superintendent meets with the students, explaining the role of trademark and copyright law in our society, and proposing a contest to replace the challenged trademarks.

- Enter into a license. This may buy peace in the short term, but may merely delay the expensive and politically and socially unpopular revisions to school mascot/colors/facilities when the license expires or is revoked.

- Stand your ground, knowing that the costs of litigation are substantial, and check your insurance coverage—you may very well have partial or complete coverage for copyright and/or trademark infringement claims.

You and your attorney should consider whether to go public with the demand, keeping in mind applicable open meetings and records laws, and weigh local, state, and national political interests. Local legislators may be helpful if your school is within the same state as the university, for example.

In the meantime, if you are faced with a trademark enforcement action, consult the playbook above, as well as your attorney. ■

## MORE INFORMATION

Schools find themselves on the enforcement end of trademark rights, as well. Two pressing issues are: (1) how to protect a school's mascot; and (2) how to get a clean one from the beginning. A previous article in NSBA's Council of School Attorneys (COSA) publication, *Inquiry & Analysis*, addresses registering and protecting school logos and mascots. "Protecting School Trademarks: What Is in a Name?" by Linnea Simons and Tim O'Neill, Caplan and Earnest, LLC, Boulder, Colo. Dec. 2007. [www.nsba.org/secondarymenu/cosa/resources/inquiryanalysis/07-archive/inquiryanalysisdec07.aspx](http://www.nsba.org/secondarymenu/cosa/resources/inquiryanalysis/07-archive/inquiryanalysisdec07.aspx).

Also see "School Trademarks & Copyrights: What School Corporations Need to Know to Ensure Protection of Names, Logos & Work Product" by COSA member Seamus Boyce at Church, Church, Hittle & Antrim in Indianapolis.