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Crowdfunding in Public Schools: Mitigating Potential Liability through Effective Policies

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On May 7, 2015, Stephen Colbert announced that he would fund every existing grant request made by a South Carolina public school teacher on the education crowdfunding website DonorsChoose.org. He and two other nonprofit organizations pledged \$800,000 to fund nearly 1,000 projects for over 800 teachers at 375 schools.¹ The trend of crowdfunding has hit the education community by storm, but schools should approach this new trend with caution and carefully consider whether policies are necessary now to regulate what teachers are doing online in the name of specific schools. A brief review of some of the publicly-available teacher posts on DonorsChoose.org, a site that is generally more protective of school and student interests than many other crowdfunding sites, revealed some concerning instances of potential liability, which are discussed below. This article provides an overview of the issue, a summary of some of the common areas of legal liability, and some simple and effective ways to limit a school's exposure to liability.

At the time of this writing, there were 25,197 open projects waiting to be funded on DonorsChoose.org and that's just one of the hundreds of crowdfunding sites available. Crowdfunding can be broken down into two different types: those aimed at raising capital for a business venture and those aimed at raising funds for charitable donations. For the most part, the charitable donation aspect of crowdfunding is the type that is gaining great traction in public schools, both for legal and practical reasons, but because it is important to understand the context and the vast practical and legal differences that exist between both of these categories, a brief overview of both types is provided below.²

The business venture crowdfunding is generally undertaken by start-up businesses in lieu of getting a traditional business capital loan, with donors being promised – and expecting to get – some sort of return on their investment. It is a small-business financing model, of sorts. In this category of investment-based crowdfunding are two general types: pre-purchase/reward-based investing and peer-to-peer lending. With the pre-purchase/reward models, investors are promised a prototype of the product being funded and/or a specifically-designated perk or reward for investing (a CD and thank-you-note from a musical artist, etc.). These are, for all legal intents and purposes, contracts for the sale of goods and/or services, and they do not have the same securities law implications that the second type – the peer-to-peer lending model – has.

With the second type of business venture crowdfunding, the peer-to-peer lending model, investors are expecting to be repaid, often with a financial return on their investments or a share in the company.³ Any lending or investment involving a financial return, including stock in the company, is regulated by securities law, which has historically been limited to accredited investors.⁴ In March of 2015, the SEC issued new regulations that open the door to non-accredited investors wishing to participate and invest in online capital-raising mechanisms.⁵ While it is possible that securities-based crowdfunding may be utilized by public schools in the future, research of current trends did not reveal any instances of its current use in public schools today. This is likely due to the fact that the raising of funds by local government entities, such as public schools, is heavily restricted by state laws that would preclude the use of securities-based crowdfunding as a capital-raising measure.

State Crowdfunding Legislation as a Means to Raise Capital for Government Projects

While donor-based crowdfunding for civic projects is fairly common, a few states have explored the use of crowdfunding for the purposes of raising capital for public projects. Hawaii was the first state to propose government crowdfunding legislation. *Hawaii 3R's*⁶ is a 501(c)(3) nonprofit organization dedicated to maintaining and repairing the state's public schools. Hawaii House Bill 2631 (2014)⁷ would have required *Hawaii 3R's* to work with the state department of education to select two projects for a public crowdfunding pilot program designed to rebuild the schools. Under the Bill, the projects were required to be initiated by a member of the community and approved by the school that would ultimately receive the services. Hawaii would launch a crowdfunding campaign to fund the project, and the state of Hawaii would then donate up to \$50,000 in matching funds. The bill also provided that 10% of the overall funds that would be raised would be donated to a school in Hawaii that qualifies for federal financial assistance. Although the bill ultimately did not pass, it may have paved the way for other legislatures to engage in some out-of-the-box thinking about raising revenue for public schools in non-traditional ways.

In June of 2014, a bill was proposed in the New Jersey state legislature that would permit both donation-based and investment-based crowdfunding for government projects.⁸ It would specifically permit several different types of government entities to raise funds for specific projects via crowdsourcing. While the bill has not advanced past the proposal phase, and would presumably be riddled with legal and practical issues if fully implemented, it provides an interesting look at how states are considering this type of funding as a mechanism for both accepting donor capital as well as utilizing investment-based crowdfunding for funding of projects.

Donation-Based Crowdfunding

Donation-based crowdfunding sites, such as DonorsChoose.org, are becoming increasingly popular with teachers and other individuals seeking to raise funds for their schools. Numerous articles, including articles found on reputable education-oriented websites,⁹ extol the virtues of crowdfunding for public school educators, but no articles or guidance that alert educators to the potential dangers and/or liability that schools may face with regards to these fundraising techniques could be found.

A review of some of the posts from educators on DonorsChoose.org¹⁰ revealed some significant legal issues within the teacher posts themselves, including potential FERPA violations and liability under the Individuals with Disabilities Education Act (IDEA).¹¹ Regulation by schools of individual teacher postings on crowdfunding sites is a bare-minimum essential to prevent some of the issues described below.¹²

In one instance, a teacher in a South Carolina public school describes her 7-student classroom in detail, explaining that 6 are boys, and 5 are nonverbal. She posts a picture of some of her special needs students. While photographs of students may be considered to be Directory Information under the Family Educational Rights and Privacy Act (FERPA),¹³ posting a picture and referring to the pictured students by their specific disabilities (in this case, autism), is likely a FERPA violation. While it is possible that the teacher obtained signed releases from the students' parents, which would have allowed her to publicly disclose the information, there is no indication that such action was taken.

In the same post, the teacher highlights the importance of the iPads that the teacher is requesting for her students' communication needs, indicating that the students' failure to communicate without the requested iPads "has led to some discipline issues." Both the fundamental need for the devices as assistive technology to properly educate the students, as well as the fact that the students are being

disciplined for conduct related to their lack of communication skills are potentially significant IDEA issues for which the district in question could be held liable.

Another teacher in a California school district specifically states that the lack of materials such as puzzles, math manipulatives and fine motor materials has prevented her students from achieving their math IEP goals. She indicates that the receipt of the requested materials will “assist in implementing their IEP goals and ensuring that their goals are being met and achieved.” As with the above example, under the IDEA, if such items are necessary for a student to meet his or her IEP goals, then the district is arguably required to provide those items pursuant to the IDEA and can be held liable for not doing so regardless of availability of funds.

Another teacher, in describing her 13-student classroom where all of her students have autism with varying degrees of functional skills, states: “Because of their inability to care for themselves, our classroom becomes filthy and germ-ridden by the end of the day. We need cleaning supplies and health supplies like tissues and hand sanitizer to help keep our students healthy.” Once again, this entry, describing its “filthy” and “germ-ridden” special education classroom, describes circumstances that may be viewed as discriminatory and/or prohibited under the IDEA.

The entries, themselves, may also be clearly admitting liability under the IDEA. Another California teacher, in her plea for \$403 worth of puzzles, fine motor activities, and math manipulatives, “to help them achieve their IEP goals,” states the following: *“Unfortunately the special education program at the school district in which I currently work for [sic] is not very supportive in making sure that the children have the materials that they need to ensure that they are successful students.”* The entry clearly indicates her name, the grade that she teaches, the name of the elementary school at which she teaches and provides a link to the school’s website.

Schools need to be aware that crowdfunding entries may potentially violate school rules and/or policies, as well. In one entry, a teacher was asking for \$1,769 for food-based positive behavior incentives. It stated that “[m]y students need snacks like juice, lollipops, hot chocolate and cookies to help promote and maintain good behavior.” Among other things, the teacher was specifically asking for was 360 bags of Frito Lay variety packs of chips, 240 individual bags of Keebler Fudge Stripe mini cookies, 1,200 dum-dums lollipops, 216 packs of Grandma’s cookies, 1,200 packages of Sour Patch Kids, 600 packets of hot chocolate, six 27-oz. bags of “Chewy Favorites Candy Mix,” a jar containing 1,445 lollipops, and 60 Lindt chocolate truffles. This entry prompted a review of the school’s wellness policy, which stated:

The primary goal of nutrition education is to influence students’ eating habits. The district will integrate nutrition education into classrooms as often as possible by using the Health In Action: A Strategic Implementation Guide, which is a set of lesson plans and activities provided by the Mississippi Department of Education, Office of Health Schools.

...

The district will also establish guidelines for foods that [are] available during the school day with the objective of promoting student health and reducing obesity in children.

...

One of the board’s objectives is to educate students and parents about food consumption behavior to influence healthier choices. The board is committed to offer solutions to provide the healthiest choices available on school campuses during the school day, at after-school programs, and extracurricular activities to meet its wellness goals.¹⁴

In summary, while many of the entries posted on the DonorsChoose.org site posed little-to-no legal liability, there were an alarming number of entries that did pose some potentially significant issues. This included a number of potential FERPA issues related to teacher posted photographs, which were combined with specific written information in the posts about the classes. These descriptions could also legally be considered to be potential IDEA violations, and/or violations of specific district policies. Other posts, while they did not pose any particular threat of liability, painted the schools and/or districts in a very negative light when asking for funds.

Safeguards for Schools Regarding Donation-Based Crowdfunding on Behalf of Schools by School Employees

Most teacher crowdfunding posts are designed to raise funds under the name of a specific school. As discussed above, schools should have careful regulations regarding who can raise funds on behalf of a school and what procedures and protections should be put into place to protect the school in such instances. Teachers should be prohibited from using the school's name or any other identifying features unless the teacher is in full compliance with the procedures and/or protocols established by the school. Below are some recommendations for safeguards that should be put into place to protect schools. These protocols are designed to assist schools in reducing potential liability caused by teacher crowdfunding posts.

Require Administrative Approval of all Postings Before They are Published

Individuals wishing to raise funds for a particular school should be required to obtain written approval after providing pertinent details, such as the site on which the funds would be raised, a complete copy of the proposed listing, and a copy of the school personnel's personal profile to be listed on the site. Approving administrators should carefully review the proposed posts to ensure that no potential legal liability, violation of state or federal laws, and/or violation of the

school's policy and/or procedures exists. The proposed posts should also be reviewed to ensure that the posts do not paint the school, the district, or any of its employees or students in a negative light. Ideally, school regulations/procedures should prohibit all posting of student images on the site, limiting pictures to that of the classroom, the teacher and/or photos of students where the students are not identifiable (i.e., their hands, backs of heads, etc.). Reviewing administrators should have the authority to deny permission for a teacher to crowdfund on behalf of the school and/or the teacher's individual classroom where potential issues or violations are present. Where a reviewing administrator spots an issue that might have legal implications, legal counsel should be consulted.

Develop an Approved Site List and Only Permit Crowdfunding on Sites that Send Proceeds and/or Items Directly to the Schools, NOT the Individual Employee

Several education-based crowdfunding sites already have safeguards in place to prevent misuse of funds and/or misappropriation of materials.¹⁵ Funds raised and/or items purchased should go directly from the crowdfunding site to the school being served. Schools should require that funds and/or items be delivered directly to the school administrator. Many crowdfunding sites are not specific to schools and do not include this safeguard, but there are some crowdfunding sites, including DonorsChoose.org, that are tailored specifically to schools and that have this straight-to-the-school delivery system that may minimize misuse. If they wish to permit crowdfunding by teachers, schools should carefully consider all of the available sites and approve only those that provide the safeguards deemed most appropriate by the school.

Ensure that Proceeds/Items Obtained Through Crowdfunding Fulfill Stated Purpose

Funds raised and/or items purchased via crowdfunding must be used for their designated purpose. As such, schools should have safety mechanisms in place to ensure that the funds/materials are being used as described.

Schools should also make clear, via written policy or procedures, that all funds and/or materials are property of the school and shall remain with the school in the event that the teacher terminates his or her employment with the school.

Require that all Crowdfunding Activities, as Well as Activities Being Funded, be Fully Compliant with Board Policies

As discussed, above, the teacher's request for \$1,769's worth of junk food for positive behavioral interventions appears to be in violation of that district's wellness policy. Some of the other examples were likely violations of their districts' FERPA/student records policies and/or other student confidentiality policy requirements. Thus, it is imperative that, first and foremost, teachers are made aware that crowdfunding postings and requests *must* be compliant with all board policies. Administrators who are reviewing and/or approving crowdfunding requests should be careful to review them for policy violations and deny any that do, or have the potential to, violate existing district policies.

Conclusion

Crowdfunding is a relatively new source of revenue streaming that is being widely used by the education community. School attorneys should advise their clients to take reasonable measures to regulate the crowdfunding that is currently being done in the name of the schools and should monitor this fast-moving trend for the onslaught of legal issues, legislation and best practices that will inevitably follow. Such measures should include the adoption of a district-wide policy either prohibiting or specifically and carefully restricting crowdfunding in the areas raised above. They should also include awareness training for both administrators and teachers regarding the policy requirements, the requirements of any administrative regulations implemented to ensure compliance, and the legal and policy-related issues that crowdfunding can raise. Heightened awareness and regulation of these practices protect the students first and foremost, but they also protect the school and teachers from potential liability.

¹ Nathaniel Carey, *Stephen Colbert: South Carolina's \$800,000 man*, (May 10, 2015). Available at: <http://www.greenvilleonline.com/story/news/local/2015/05/10/stephen-colbert-funding-grant-requests-south-carolina-public-school-teachers-donorschoose-crowdfunding-site/70938100/>.

² The summaries in this document are very broad. A good resource for understanding the differences among the available types of crowdfunding models, as well as the impact of securities law on the those involving financial returns on investments is C. Steven Bradford's analysis: *Crowdfunding and the Federal Securities Laws* (October 7, 2011), which is made available by the SEC on their website: http://www.sec.gov/info/smallbus/acsec/bradford_crowdfunding.pdf.

³ C. Steven Bradford, *Crowdfunding and the Federal Securities Laws* (October 7, 2011). Available at: http://www.sec.gov/info/smallbus/acsec/bradford_crowdfunding.pdf.

⁴ *Id.*

⁵ See the SEC's summary and factsheet here: <https://www.sec.gov/news/pressrelease/2015-249.html>.

⁶ See their website: <http://hawaii3rs.com/>. The 3 R's stand for "Repair, Remodel and Restore Our Schools."

⁷ See <https://legiscan.com/HI/bill/HB2631/2014> for a full-text version of the bill.

⁸ NJ A3378. The bill can be viewed here: <https://legiscan.com/NJ/bill/A3378/2014>.

⁹ See EducationWorld.com, *Raise Money With Crowdfunding: Top 9 Tips for Schools* (2014). Available at: http://www.educationworld.com/a_admin/crowdfunding-fundraising-schools-tips-best-practices.shtml#sthash.nLa420PV.dpuf. See also Edutopia's guide for teachers, *Raise Money for Your School Using Crowdfunding*, available at: <http://www.edutopia.org/crowdfunding-fundraising-resource-guide>.

¹⁰ Note: The author selected this particular site due to its popularity among teachers and its recent media attention. The site was also selected due to its school-friendly policies and practices. The issues raised regarding teacher posts on this site reflect a need for teacher education and specific school policies regulating teacher use of crowdfunding and should not be construed as being critical of this important and beneficial education funding tool.

¹¹ 20 USC §1400 et seq., 34 CFR Part 300.

¹² Due to the legally-sensitive nature of the examples in the section below, the author, while describing examples of accurate DonorsChoose.org listings, at the time of the drafting of this document, has not provided specific citations or references for this section.

¹³ 20 U.S.C. § 1232g and the FERPA regulations are found at 34 CFR Part 99. See the U.S. Department of Education's website for the full text of the law as well as helpful resources. Available at: <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html>.

¹⁴ Jackson Public Schools, Jackson, Mississippi wellness policy. Available at: http://www.jackson.k12.ms.us/cms/lib011/MS01910533/Centricity/domain/964/board_policies_approve_d/c/chaa.pdf.

¹⁵ There are many different types of crowdfunding sites available, and an internet search will provide a variety of guides for educators. Edutopia.org has a fairly comprehensive guide that is specific to education. It is available at: <http://www.edutopia.org/blog/film-fest-online-fundraising-crowdfunding-resources>.