



BRAND NAME SCHOOLS
DEALING WITH COMMERCIAL AND CHARITABLE ENTERPRISES
IN NEW YORK STATE PUBLIC SCHOOLS

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I. Commercial and Charitable Access to New York State Public Schools¹

A. Education Law §414 - Use of schoolhouse and grounds -- Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations.

B. Permissible uses for School District Property -- Education Law §414 grants access to New York State Public Schools for the following reasons:

- For the purpose of instruction in any branch of education, learning or the arts.
- For public library purposes.
- For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.
- For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purposes; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.
- For polling places.
- For civic forums and community centers.
- For classes of special instruction for children classified as having a disability.
- For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.
- For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

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C. Arbiter of Access to School Property -- Section 414 of the Education Law gives a school board the authority to adopt reasonable regulations with regard to granting the use of school buildings to outside organizations.

- No association or organization has the right to use a school building without the express permission of the board. For example, local teachers' associations or organizations are not entitled as a matter of right to use a school building for meetings. *Matter of Charlotte Valley*, 18 PERB ¶ 3010 (1985).
- The board has the authority to prescribe the terms of use of a school building, including a rental fee sufficient to cover expenses resulting from the prescribed use (with limited exceptions) and may also refuse to grant an organization's request for use. For example, if it can be proven that a "clear and present danger" of possible damage to the building exists, the board can deny access to the organization. *Matter of Ellis*, 77 St. Dep't Rep. 32 (1956).
- Access to district property cannot be granted or denied for purely pre-textual reasons, the board of education of each individual school district is charged with the uniform application of their usage policy. The New York State Court of Appeals upheld the rights of districts to adopt and implement a policy that bars access to groups that engage in discriminatory practices. *Lloyd v. Grella*, 83 N.Y.2d 537 (1994).

D. Military Access to School Property -- Section 2-a of the New York State Education Law and the federal No Child Left Behind Act of 2001 (NCLB) provides that any school district receiving financial assistance must provide military recruiters the same access to public high school secondary students it provides to post secondary educational institutions and prospective employers. 20 USC § 908(a)(3).

- Since the U.S. military has the right of access primarily to recruit students, it is therefore arguable that they possess the concomitant right to recruit donations to the service. However, the U.S. military generally does not need to actively solicit donations on its own behalf (U.S. Department of Defense 2005 Budget Allocation -- 401.7 billion dollars)(U.S. Department of Education Budget Allocation -- 57.3 billion dollars.)²

E. Patriotic Society Access to School Property -- Under the federal No Child Left Behind Act of 2001 (NCLB), a school district may not deny use of its facilities to any group listed as a "patriotic society" in federal law (36 USC §10101,) including, for example, the Boy Scouts, Girl Scouts and the Boys and Girls Club. 20 USC § 905(b)(1).

² 2005 Budget Allocation figures courtesy of the United States Government Printing Office.
<http://www.gpoaccess.gov/usbudget/fy05/browse.html>

- Girl Scout cookies may be sold on school district property only if they are sold to the public during an event on district property. Girl Scout cookies may not be sold to students during school hours as it would be in conflict with Education Law §915, which prohibits the sale of certain sweetened foods from being sold on school property during the school day.
- Title 36 of the United States Code identifies over 50 national organizations as “patriotic societies” thus entitled to access to public school property under NCLB. In addition to the Boy and Girl Scouts, these organizations include, but are not limited to, the American Legion (Chapter 217,) AmVets (Chapter 227,) the Future Farmers of America (FFA)(Chapter 709,) and the Sons of Union Veterans of the Civil War (Chapter 2003.) Since these organizations have the right of access under NCLB, it is therefore arguable that they possess the concomitant right to recruit donations for and on behalf of the organization.
 - However, a school district may not make a donation of district funds to one of these organizations, even if it is for a charitable purpose. Such a donation would be considered an improper gift of public funds under Article VIII, section 1 of the New York State Constitution, which prohibits the disbursement, gift or loan of public moneys and resources for the benefit of private groups or individuals. 29 Opn. St. Comp. 154 (1973); *see Appeal of LaLonde*, 31 Educ. Dep’t Rep. 408 (1992).

F. Payment for Access to School Property -- It is well established that a district may charge entities using its building “an amount sufficient to cover all resulting expenses.” Although many districts have in the past been extremely generous in allowing outside groups (charitable and commercial,) to use its buildings with minimal fees, in these tough fiscal times, districts are now tightening their belts and looking to increase the revenue stream from the use of buildings.

- *Appeal of Emilio*, 33 Ed. Dept. Rep. 75 (1993). Commissioner Sobol interpreted the reference in Education Law §414 to the general public as meaning the general public of the community, “that is of the school district.” Therefore, he held “I can discern no evidence of legislative intent that a school district should be precluded from denying or limiting access to school property by non-residents.” Furthermore, and more importantly, he held that the fee which a school district charges may exceed actual expenses. Thus, if a school district wishes to increase its income from the use of buildings, it could charge higher fees for non-resident groups, thus increasing its revenue.
- A school board may also charge a nonresident for the use of district property (e.g., jogging track), since the commissioner of education has interpreted the Education Law to require that any meeting, entertainment or other use for the benefit of the community be non-exclusive and open only to the general public of the school district, that is, to the residents of

the school district. *Matter of Emilio*, 33 Educ. Dep't Rep. 75 (1993). According to the commissioner, it would be highly unusual to interpret the language of Section 414(1)(c) as compelling school districts to open up the uses of its property intended to promote the welfare of the community served by the school district to those who did not reside in the community.

- But, a school district may not charge a fee to a religious organization that is higher than one normally charged to outside organizations. To charge churches higher fees than other nonprofit organizations would discriminate against religious speech and interfere with or burden the church's right to speak and practice religion as protected by the free exercise clause. *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994), cert. denied, 511 U.S. 1143 (1994).

II. Commercial Enterprise in New York State Public Schools

A. Definition of Commercial Activities- the sale of products, direct advertising, indirect advertising and market research. Commercial activities may include, but are not limited to:

- Sponsorship of Programs and Activities - Paying or subsidizing school events. For example, the Thompson Middle School in Newport, Rhode Island- auctioned off to corporations for as much as \$250,000 the right to put business names and logos on anything from individual books to entire school buildings.
- Exclusive Agreements - i.e. Pouring rights contracts with beverage distributors.
- Incentive Programs - Providing goods, awards, or services to a district when students engage in a specific activity, such as Pizza Hut's "Book It" promotion awards individual size pizzas to students who complete an allotted amount of reading.
- Appropriation of Space – Allowing the corporation to place a corporate logo on school space. For instance, "America's Schools" corporations donate a percentage of their sales to be distributed to schools in return for the right to display a star shaped America's Schools logo on their products.
- Corporate Sponsorship - Schools sell to corporations the right to put their names and logos on school buildings, gymnasiums, libraries and instructional material (i.e. School in Brooklawn, New Jersey named a new gym after the supermarket ShopRite for \$100,000.)
- Sponsored Educational Materials – Materials are supplied by the corporation with instructional content. For instance, Verizon Wireless distributed a drivers education curriculum called "Vehicle Intelligence Quest" which teaches new drivers about wireless safety behind the wheel. Jelly Belly Jelly Beans distributed science, math and social studies lessons which includes product tie ins as well as sample packets of jelly beans.

- Electronic Marketing - The corporation gives the school electronic programming or equipment in return for the right to advertise in the school
- Privatization – Management of schools by private for-profit corporations or non-public entity
- Fundraising – Any activity conducted to raise money for school operations or extra-curricular activities. Classic examples is of General Mills donating money to schools based on the number of General Mills box top coupons the students of a particular school turn in.

B. New York State Authority on Commercial Activities- New York State has several bodies of authority which address the issue of what, if any, commercial activity is permitted within New York State Public Schools.

1. **New York State Constitution** -- Article VIII, §1 of the New York Constitution -- "No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking..."
2. **New York State Law** -- New York. N.Y. Veh & Traf. Law §375(21-h) makes it illegal to advertise on school buses.
3. **Commissioner’s Regulations** -- 8 New York Codes, Rules and Regulations §23.2- “Boards of Education or their agents shall not enter into written or oral contracts, agreements or arrangements for which the consideration, in whole or part, consists of a promise to permit commercial promotional activity on school premises, provided that nothing in this Part shall be construed as prohibiting commercial sponsorship of school activities.
4. **Commissioner’s Decisions** -- Generally, Commissioner’s decisions involve whether an entity should be permitted to use school facilities in furtherance of a commercial activity and whether the activity served “a school purpose.”

C. Specific Commercial Activities Issues - New York State has repeatedly addressed, through decisions of the NYS Commissioner of Education and NYSED Guidance Memos, specific issues related to the allowance of commercial activity in New York State Public Schools.

1. **NYS School Board Cannot Act as “Middleman”**
 - *Matter of Countryman*, 1 Ed. Dept. Rep. 538 (1960) -- The Commissioner condemned the use of teachers to solicit and collect premiums for accident insurance from students participating in the athletic program.

- *Matter of Shapnek*, 3 Ed. Dept. Rep. 99 (1963) -- The Commissioner again condemned the solicitation of accident insurance through staff members.
- *Matter of Kalsmith*, 6 Ed. Dept. Rep. 20 (1966) -- The Commissioner stated that the board was "acting as a middleman and offering the product of a private corporation to the parents of school children, and in so doing is utilizing the time and services of school personnel in making such offer and collecting premiums. . ."
- *Matter of Hupert*, 6 Ed. Dept. Rep. 91(1967) -- "Boards of education may not act as *middlemen* in offering the product of a private corporation to the school children and in doing so utilize the services of school personnel in offering and collecting premiums and making out claim forms."
- *Matter of Darrall and Mort*, 5 Ed. Dept. Rep. 197 (1996) -- The Commissioner found improper the use of students themselves as middlemen for private undertakings student council held and candy sale, at which candy was sold by pupils where there would be no legal objection if the students purchased the candy and resold it for a profit to finance student activities It would be illegal if the students were using the school facilities and acting as agents or employees of the manufacturer for the purposes of selling the candies. "Public school facilities may not be used in aid of private business."

2. Sale of School Photographs

- *Matter of Albert*, 7 Ed. Dept. Rep. 7 (1967) -- The Commissioner held that photographs taken on school grounds for sale by a private enterprise were illegal. "School children who are in attendance by reason of the compulsory attendance law should not be permitted to be exploited through the sale of products. . . The fact that a percentage of the sale price was turned over to a scholarship fund does not serve to meet the objection that the pupils are being exploited through the sale of a product to them under the auspices of school authorities."
- *Matter of King*, 8 Ed. Dept. Rep. 86 (1968) -- The Commissioner found a way around the photograph issue. He stated that where photographs were taken for I.D. cards on school premises, the subsequent solicitation of additional prints through the PTA did not involve the use of school district facilities or personnel for private profit.
- *Matter of Jones*, 16 Ed. Dept. Rep. 156 (1976) -- Where there was no school purpose, the use of school facilities by the PTA to sell photographs violates the State Constitution.

- *Matter of Fusare* (Elmira Heights C.S.D.), 19 Ed. Dept. Rep. 543 (1980) -- The use of school facilities by private photographer (for pictures other than for ID purposes,) held impermissible.
- *Matter of Hoyt* (Fulton City S.D.), 20 Ed. Dept. Rep. 316 (1980) -- Class photographs are a school purpose, however, solicitation of the private sale of photos impermissible.
- *Appeal of Tarolli*, 38 Ed. Dept. Rep. 60 (1998) -- Acting Commissioner Cate held that "...the participation of school personnel and the use of school property in the taking of yearbook photographs is permissible only if the three conditions specified for a "school purpose"...are met... (1) the board of education has approved the practice, (2) all prospective vendors are given full and equal opportunity to compete and (3) students are fully involved in the process."

3. Sale of School Rings

- *Matter of Puls*, 17 Ed. Dept. Rep. 430, 431 (1978) -- The Commissioner held: "The practice of allowing representatives of a private firm to use school premises to solicit orders for graduation announcements and class rings is clearly illegal.. No valid school purpose is served..."
- *Matter of Toftegaard*, 23 Ed. Dept. Rep. 405 (1984) -- The Commissioner held that the benefits of fundraising and class unity "can be readily achieved through the use of a systems which does not violate the clear dictates of the State Constitution."
- *Appeal of Gary Credit Corp.*, 25 Ed. Dept. Rep. 385 (1986) -- The Commissioner held: "Permitting the use of school personnel and premises for the conduct of private business, including the practice of allowing representatives of private firms to solicit orders for class rings on public school property, clearly contravenes the constitutional prohibition."
 - Counsel Stone issued a memo on December 8, 1986, which established the ten commandments of school rings. Basically, the sale of class rings would be a "school purpose" where (1) the board of education has authorized in-school promotion and sale of class rings, (2) all prospective vendors are given full and equal opportunity to compete and (3) students are fully involved in the process."
- *Appeal of Gary Credit Corp. II*, 26 Ed. Dept. Rep. 414 (1987) -- Counsel Stone's memo was officially adopted by the Commissioner and in a significant erosion of his holdings on constitutional prohibitions, Commissioner Ambach stated: "Rather, where the primary purpose of such an arrangement is a public

benefit, i.e., where it serves a school purpose and any benefit accruing to the private entity is merely incidental to such public purpose, the constitution is not violated."

4. Licensing District Property -- Beverage Pouring Rights

- **NYSED Guidance** -- In 1998, Kathy A. Ahearn, Esq. issued a memorandum regarding contracts for exclusive "pouring rights." The memo acknowledged that throughout the state, growing numbers of districts were being solicited to enter into contracts giving a specific beverage manufacturer the exclusive right to sell its beverages on campus in exchange for a fee and other consideration.
 - The memo and model contract sought to balance the commercial exploitation of children and the use of school facilities for private commercial gain against "the search for new revenue streams."
 - As with Counsel Stone's prior memoranda, the 1998 memo broke new ground and opened the door for many districts throughout the state to enter into contracts with Coke, Pepsi or Snapple and to receive scoreboards, lights on the football field, and other compensation in exchange.
 - Subsequent Commissioner's opinions have established the basic validity of "pouring rights" contracts to exist. Interestingly, unlike the previous case law involving rings, yearbooks and photographs, the pouring rights memoranda from the Commissioner does not identify the school purpose which the contracts promote.
- **Prohibition on Multi-Year Contracts** -- The courts have applied the principle that a contract whose duration exceeds the one-year term of each board of education violates the public policy that one board may not bind a successor board in areas relating to governmental matters unless a longer term is expressly provided for in statute. *Morin v. Foster*, 45 N.Y.2d 286(1987); *Matter of Lake v. Binghamton Housing Authority*, 130 A.D.2d 913 (3d Dept. 1987).
 - In *Matter of Ramapo Carting Corp. v. Reisman*, 192 A.D.2d 922 (3d Dept 1993), the Court held that when there is a adequate provision in a contract for a successor board to terminate a multi-year contract at will, the contracting board will not be illegally binding the successor board and the multi-year contract is not void as against public policy.
 - Although the Commissioner has cautioned in *Appeal of Citizens for Responsible Fiscal & Educ. Policy*, 40 Ed.

Dept. Rep. 315 (2000), that “front-loaded multi-year contracts may make it difficult for future Boards to terminate”, he has not invalidated pouring rights contracts on this ground.

- **Advertising in Connection with Pouring Rights Contracts** -- To determine the appropriateness of a particular advertisement, the Commissioner has established that in each individual circumstance certain criteria will be applied. These criteria includes the nature and degree of the commercial content; and the appropriateness of each use will turn on the specific facts presented. *Appeal of American Quality Beverages I & II*, Ed. Dec. No. 14,533; 14,805. In *AQB I & II*, a lighted vending machine panel, where the picture could be seen even if not backlit by electric lights, was not the type of electronic medium that is addressed by Part 23, nor were the statements on the panel in violation of Article VIII §1 of the New York State Constitution.³ Commercial messages communicated through an electronic medium (e.g. television, radio, computer,) are not permitted on school property.
 - In the *Appeal of American Quality Beverages LLC I*, 42 Ed. Dept. Rep. 144, Decision No. 14804 (Sept. 4, 2002), the Commissioner concluded that the use of a lighted product panel on a vending machine containing only a photograph of an actual bottle of Pepsi soda with the name Pepsi written on it did not violate the Constitution because the vending machines are the mechanism by which the vendor provides the service contracted for by the Board. Any advertising effect of the panels would be incidental to the services and products provided pursuant to the contract and such incidental benefit to the vendor would not violate the Constitution.
 - In the *Appeal of American Quality Beverages LLC II*, 42 Ed. Dept. Rep. 153, Decision No 14805 (Sept. 4, 2002), the Commissioner reached the same conclusion regarding lighted panels for PowerAde which contained not only a picture of the product and its name, but also printed information on the bottle label that the product is “the official sports drink of the Olympic Games.” The Commissioner stated with great conviction, “districts

³ The panel was not an electronic communicative medium that was directly transmitting commercial messages to students electronically. Instead, the panels are static pictures that are simply illuminated by lights behind the panels. The electronic lighting is not itself transmitting any content. The vending machine panel therefore did not violate the provisions of Part 23.

should consider whether such apparently promotional statements are appropriate to be placed in its school at all or whether the district should require that only plain, generic panels should be used in schools.”

5. Licensing District Property -- Commercial Promotional Activity

- 8 NYCRR §23.2 of the Regulations prohibits boards of education from entering into any contracts or arrangements for which the consideration, in whole or in part, consists of a promise to permit commercial promotional activity on school premises. Commercial promotional activity is defined in the Regulations as “any activity designed to induce the purchase or extol the benefits of a particular product, which is conveyed to students ‘electronically through such media as, but not limited to, television and radio.’” 8 NYCRR §23.1(b). Additionally, Article VIII, §1 of the New York State Constitution prohibits the use of public property⁴ for advertising of private business entities or products. *See, e.g.*, Op. Atty. Gen. 94-56; 1973 Op. Atty. Gen. 51.
- Part 23 of the Regulations allows commercial *sponsorship* of a District activity, which is distinguished from commercial promotional activity as “the sponsorship or the underwriting of an activity on school premises which does not involve the commercial promotion of a particular product or service.” 8 NYCRR §23.1(b); *State Education Department Counsel and Deputy Commissioner for Legal Affairs Opinion*; May 10, 2000. Part 23.2 should not be construed as prohibiting commercial sponsorship of school activities, but rather limits the extent to which a District may accept commercial promotional activity on its property. 8 NYCRR §23.2. Part 23 of the Regulations has been held inapplicable to certain forms of promotional activity (forms other than electronic media,) such as cups bearing the commercial logo or signage with the commercial name or logo. *Appeal of Citizens for Responsible Fiscal and Educational Policy*, Ed. Dec. No. 14,489.
 - For instance, a vinyl sign of unobtrusive size bearing a commercial name or logo and hung in stasis during District athletic events⁵ as an acknowledgement of the vendor’s support or sponsorship of a District athletic activity would

⁴ This section is applicable to school district premises, and §23.1(d) of the Regulations defines school district premises as any “real property, school vehicle or facility under the control of a local board of education where access to school children may be had by virtue of their attendance at school, including but not limited to school buildings, school buses and school grounds.” 8 NYCRR §23.1(d).

⁵ Athletic events are an activity on school premises that do not involve the commercial promotion of a particular product or service and therefore may allow corporate sponsorship under 8 NYCRR §23.1(b).

be “appropriate,” depending on the size of the sign and the nature and degree of the commercial content contained therein. Because this sign would not be an electronic transmission of a commercial messages specifically prohibited by the Regulations, it is unlikely that the sign would be considered “commercial promotional activity” such that the District would be prohibited from its display.

- The Commissioner has opined that it is unreasonable to find that no athletic equipment or other equipment used on school premises may ever, under any circumstances, exhibit any private logo or corporate name. *Appeal of Citizens for Responsible Fiscal and Educational Policy*, Ed. Dec. No. 14,489. The Commissioner has held that “certain acknowledgements” by “appropriate signage” of the financial support of a private vendor are permitted under Article VIII, §1 of the Constitution. *Id.* The State Comptroller has similarly opined that a nominal plaque of a private donor's identity on public property acquired through donated funds will not violate this constitutional limitation. *See, e.g., Op. State Compt. 90-6.*
 - It should be noted that although the Commissioner held the commercial statements in both *AQB I & II* and *Appeal of Citizens for Responsible Fiscal and Educational Policy* to be constitutional, he also cautioned New York State school districts to consider whether such apparently promotional statements are appropriate to be placed in the school environment.

6. Licensing District Property -- Corporate Gift Acknowledgment

- Education Law §§1709(12) and 1804(1) authorize a central school district to accept gifts. In addition, the New York State Comptroller has opined that a county governing board could accept a corporate grant to provide day care services which was conditioned upon naming a day care room in a county building after the grantor or installing a plaque of nominal value identifying the grantor, so long as the condition was subject to the board's power to rename the room in its discretion in the future. *Opn. State Compt. No. 90-6.*
- *Appeal of Bonham*, Ed. Dec. No. 15,140 (November 24, 2004). In *Bonham*, a booster club received District approval to raise funds to support the District's music program by selling small seat dedication plaques to be displayed in the District's auditorium. The funds raised through this campaign were then given to the District as a “gift” from the booster club and used by the District to purchase equipment for the music department. In upholding this arrangement, the Commissioner held that although some financial benefit may be reaped by a corporate donor through the plaque's commercial

acknowledgement, any incidental benefit to the corporate donor was offset by the substantial benefit the District received in the form of the cash gift applied to the purchase of equipment for the school community. *Appeal of Bonham*, Ed. Dec. No. 15,140.

- For example, it is likely that a \$6,000 “donation” by a private corporate donor to a district’s booster club and then given as a “gift” from the booster club to the district for the purchase and support of school athletic activities would be allowable under the analysis presented above. Provided that the booster club follows the guidelines of the district’s policy relating to booster club fund-raising and gifts, and the acknowledgement of the corporate donor is limited to the unobtrusive appropriate signage as discussed above, this arrangement would likely be appropriate. Any incidental benefit that might be gained here by the corporate donor through the acknowledging its gift will be offset by the substantial benefit the district stands to receive in the form of the \$6,000 cash gift that will be used to support the district’s athletic activities.
- Although receipt of a gift by the District in exchange for limited commercial exposure may be appropriate, there are constitutional limitations to the use of school personnel and resources to promote private commercial products.
 - *Appeal of Citizens for Responsible Fiscal and Educational Policy*, the Commissioner stated that the use of school premises and staff to facilitate the sale or distribution of the vendor's products violates Article VIII §1 of the New York State Constitution because such activities promote private benefit without a proper school district purpose or legislative authorization. *Appeal of Citizens for Responsible Fiscal and Educational Policy*, Ed. Dec. No. 14,489.
 - The Commissioner has elaborated that a specific “pouring rights” contract violated the New York Constitution Article VIII § 1 to the extent it required school district personnel to act as “agents” of the private company by distributing products free of charge to students, permitted the redemption of receipts for pre-sold beverage products on school property or by school staff for fundraising groups. *Ibid*. Such contractual provisions promote private benefit without proper school district purpose or legislative authorization. *Ibid*.
 - Districts should employ caution when accepting gifts so as to ensure that District employees and personnel will not be used to facilitate the sale or distribution of the respective

donor's commercial products and thus be in violation of the applicable laws.

7. The Sale of Certain Sweetened Foods and Drinks

- *Education Law §915* -- prohibits the sale of certain sweetened foods. The statute states, “from the beginning of the school day until the end of the last scheduled meal period, no sweetened soda water, no chewing gum, no candy including hard candy, jellies, gums, marshmallow candies, fondant, licorice, spun candy and candy coated popcorn, and no water ices except those which contain fruit or fruit juices, shall be sold in any public school within the state.”
- *May 3, 2006* -- Recently, the nation's largest beverage distributors have agreed to halt nearly all soda sales to public schools, according to a deal in cooperation with former President Bill Clinton and his William J. Clinton Foundation. Under the agreement, the companies have agreed to sell only water, unsweetened juice and low-fat milks to elementary and middle schools, and diet sodas would be sold only to high schools.
 - Cadbury Schweppes PLC Coca-Cola Co. PepsiCo Inc. and the American Beverage Association (ABA) have all signed onto the deal, following a wave of regulation by national school districts and state legislatures to cut back on student consumption of soda amid reports of rising childhood obesity rates. Soda has been a particular target of those fighting obesity because of its caloric content and popularity among children.
 - The agreement follows an August 2005 decision by the ABA to adopt a policy limiting soft drinks in high schools to no more than 50 percent of the selections in vending machines. As such, under the agreement, high schools will still be able to purchase drinks such as diet and unsweetened teas, diet sodas, sports drinks, flavored water, seltzer and low-calorie sports drinks from distributors. School sales of those kinds of drinks have been on the rise in recent years, while regular soda purchases by students have been falling, according to an ABA report released in December. But regular soda is still the most popular drink among students, accounting for 45 percent of beverages sold in schools in 2005, the report said.
 - The agreement applies to beverages sold for use on school grounds during the regular and extended school day. Sales during after-school activities such as clubs, yearbook, band

and choir practice will be affected by the new regulations. But sales at events such as school plays, band concerts and sporting events, where adults make up a significant portion of the audience, won't be affected. How quickly the changes take hold will depend in part on individual school districts' willingness to alter existing contracts, the alliance said. The companies will work to implement the changes at 75 percent of the nation's public schools by the 2008-2009 school year, and at all public schools a year later.

III. Charitable Enterprise in New York State Public Schools

- A. Definition of Charitable Enterprise** - the gift of real or personal property to the school district.
- B. Permissible Acceptance of Charitable Gifts (Money & Personal Property)** -- Section 1709(12) of the Education Law authorizes a board "[t]o take and hold for the use of the . . . schools or of any department of the same, any real estate transferred to it by gift, grant, bequest or devise, or any gift, legacy or annuity, of whatever kind, given or bequeathed to the . . . board, and apply the same, or the interest and proceeds thereof, according to the instructions of the donor or testator."
- However, any gift accepted by a school district must be free of restrictions or requirements that are contrary to law or district policy. A district may refuse gifts outright or accept gifts on the condition that the school board will honor the donor's wishes if the board determines, in its discretion, that any restrictions or requirements attached to the gift are lawful, appropriate, and consistent with district policy.
 - For example, Title IX of the Federal Educational Amendments of 1972 prohibits school districts from discriminating based on sex. Therefore, a district should not accept and/or administer a gift which has terms that provide scholarships only to male or female students.
- C. Permissible Acceptance of Charitable Gifts (Real Property)** -- Education Law §1709(12) states the School Board may "take and hold for the use of schools or any department of the same, any real estate transferred to it by gift, grant, bequest or devise."
- Real property may be acquired in any school district for school purposes and for any other purpose by gift, grant or devise.
 - Voter approval is not necessary to acquire real property by gift, grant or devise. Education Law §1709(12-a).

D. Permissible Use of Charitable Gifts (Creation of Specific Programs) -- A school board may accept a gift of money to be used for a specific program, provided that the board does not delegate to a third party the decision of whether or not to offer the program in the first place and does not delegate any control over the matter in which the program is offered. *Appeal of DeMasi et al*, 18 Ed. Dept. Rep. 320 (1978).

- Districts must invest gifts of money not required for immediate expenditure pursuant to General Municipal Law § 11; Opn. St. Comp. I 94-15.

E. Permissible Use of Charitable Gifts (Creation of Educational Trusts) -- Section 1709(12-a) of the Education Law authorizes a board of education "[t]o take and hold in trust for the purpose of awarding scholarships in [the] schools any real estate transferred to it by gift, grant, bequest or devise, or any gift, legacy or annuity, of whatever kind, given or bequeathed to said board and apply the same, or the interest and proceeds thereof, according to the instructions of the donor or testator."

- As with other gifts, trusts accepted and/or administered by a school district must be free of restrictions or requirements that are contrary to law or district policy. For instance, Title IX prohibits school districts from engaging in practices or activities that discriminate on the basis of sex. 20 USC § 1681 et seq. Therefore, districts should not accept or administer a trust that by its terms provides scholarships only to male or female students.
- A trust established to provide scholarships for students of a particular gender does not *necessarily* violate the law. New York's highest court has ruled that "gender restrictions in private trusts do not necessarily violate public policy" [emphasis added]. Moreover, such discrimination by private parties does not violate the Equal Protection Clause of the U.S. Constitution in the absence of action by public officials in furtherance of the discrimination. *Matter of Wilson*, 59 N.Y.2d 461 (1983).
 - The New York State Court of Appeals ruled that a testamentary trust that creates a scholarship fund solely for the benefit of male students may be reformed by naming a private trustee in place of the school board, if the school board is "unwilling or unable to fulfill the discriminatory terms of the trust."
 - In the same decision, the court also ruled that where a testamentary trust established a scholarship open only to male students certified by the superintendent of schools as having the highest grades in certain subjects, and the superintendent refused to play a role in furtherance of the discriminatory purpose of the trust by certifying the required information, the trust could be reformed by allowing students to apply directly to the bank named as the trustee and to themselves submit the required grade information.

- Districts must report to the commissioner of education the existence of any trusts held for school purposes by the board of education, by school district officers or employees, or by any other persons (that the district is aware of).
 - districts must transmit to the commissioner an "authenticated copy of every will, conveyance, instrument or paper embodying or creating the trust. . . ." NY CLS Educ. Law §3703.
- Districts must invest trust funds pursuant to Estates, Powers and Trusts Law Section 11-2.2. Opn. St. Comp. I 94-15.

F. Private Foundations -- Private foundations are entities that are established as a nonprofit corporation or a charitable trust, with the principal purpose of making grants to unrelated organizations or institutions, or to individuals for scientific, educational, cultural or other charitable purposes.

In New York, 18% of school districts currently have foundations and 15% are considering forming one. Brian O. Brentor & John C. Pijanowsk, *Shaking the Tree: The Benefits (and Costs) of District Education Foundations*, SCHOOL BUSINESS AFFAIRS, May 2003, at 6.

School Districts, which are considering establishing a private foundation, should seek assistance from their school attorney. If your school attorney does not have an expertise in the non-profit tax area, special counsel may be necessary or a foundation consultant. It is also helpful to have an accountant familiar with these matters. If your school auditor is not versed in this field, another accounting firm may be necessary.

Most Educational Foundations are set up as a Not-For-Profit Corporation. A Not-For-Profit Corporation may be formed by filing a Certificate of Incorporation with the Department of State. According to §404(d) of the Not-For-Profit Corporation Law, an Educational Foundation would also need to get the approval of the Commissioner of Education, as well as permission from the school district.

Once the Not-For-Profit Corporation has been established it is necessary to qualify as a tax-exempt organization. In order to become tax-exempt Form 1023 must be completed and sent to the Internal Revenue Service. Once the Foundation becomes tax-exempt, donors will be able to enjoy tax deductions for all donations given to the Foundation.

G. Authority for Private Foundations -- Section 501(c)(3) of the Internal Revenue Code covers tax exempt organizations that are organized and operated exclusively for charitable or educational purposes.

- All Private Foundations must file Form 990-PF, an annual information return, about their finances, board members, and grants.

- Districts establish foundations to:
 - Improve the quality of the educational program
 - Supplement local revenues
 - Facilitate tax-exempt donations
 - Identify large donors
 - Fund a specific project
 - Improve School-Community relationships
- Foundations raise money by:
 - Special events
 - Telephone solicitations
 - Mail solicitations
 - Door to Door solicitations
 - Grants
 - Planned giving
- Foundations fund such projects as:
 - Special teacher-developed projects
 - Instructional materials
 - Instructional equipment
 - Extracurricular activities (i.e. sports, trips, and special events)
 - Facilities and grounds (i.e. construction and renovation)
 - Professional development for teachers and administrators
 - Salaries for additional personnel
 - Salary enrichment or stipends for existing personnel
 - Awards for exceptional teachers and other staff
 - Scholarships for college-bound students
- Benefits of Foundations include:
 - Improved school-community relationships
 - Improved quality of the educational program
 - Allow the district to provide programs that would otherwise be impossible
 - Improve teacher attitudes and morale
- Downsides of Foundations include:
 - District can become vulnerable if it relies too heavily on grants
 - Fundraising inequality between districts with foundations and those without
 - State government will take ancillary funds into account in the aid distribution formulas

IV. Conclusion

School/business relationships based on sound principles can contribute to high quality education. Corporate and charitable involvement in schools must support the goals and objectives of the schools, namely the protection of the welfare of the students and the integrity of the learning environment. As such, corporate and charitable involvement must be structured to meet an identified education need, and not a commercial motive.