

# It Ain't Us: Summer Activities, Booster Clubs, Foundations, and You!



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## Disclaimers



- KSB School Law represents only public schools and related entities (like ESUs).
- We DO NOT represent teachers, students, parents, or school employees.
- This presentation and these slides DO NOT constitute legal advice.
- Neither this presentation nor these slides shall be construed to create an attorney-client relationship between you and KSB School Law or between you and us.
- You should have no expectation of confidentiality or that anything that we discuss today is privileged.

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## Plan for Today



- PTO and Booster Clubs
- Foundations
- Before and After School Programs
- Close Up
- School Class/Teacher Trip
- NPERS
- Student Workers

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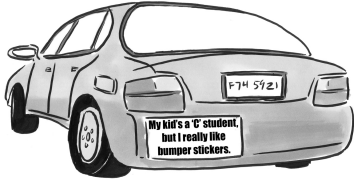
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### PTO and Booster Clubs



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### Why?



- The Good!
  - Promote goodwill
  - Provide parent and community support
  - Raise money for schools
  - Strengthens educational programs
  - Do good things for kids that schools can't do alone

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### Why?



- The Bad – Potential or actual negative legal and political consequences
  - People assume they are "us"
  - When things go wrong, we get dragged into it, maybe even sued
  - Tort liability
  - Money issues
  - Title IX issues
  - NSAA Regulations

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### The Bad...



**PTO treasurer for Center Elementary School in Plum Borough facing theft charges**

BY BRUNDA BETH  
KSB-TV, WISCONSIN  
KSB-TV, WISCONSIN



**A former Waukesha elementary school PTO treasurer has been charged with stealing more than \$54,000 from the organization**

Alex Johnson  
Milwaukee Journal Sentinel  
PHOTO COURTESY OF WISCONSIN STATE POLICE

**Omaha man accused of \$9,400-plus theft from school PTO**

Associated Press Updated on 10/6/22

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### "Inside" Groups



- School sponsored
- Formed consistent with school policies
- School controls insurance, tax liability, compliance with state gambling laws, permits, money, student supervision, fundraising activities
- School typically liable for actions of the group

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### "Outside" Groups



- Independent and external
- May be incorporated (profit or non-profit)
- Formed by parents or community members without much, if any, school input
- Not school sponsored
- Not subject to school control
- Typically not legally liable for actions or responsible for funds

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### When Insides Meet Outsides



- Sometimes "Insides" and "Outsides" look the same to the community
  - All their events are school related or benefit the school
  - They use district name
  - They use district logo
  - Their purpose is to support school, team, or extracurricular activity

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### When Insides Meet Outsides



- Guess who gets blamed when problems arise?
  - THE SCHOOL
- No legal control, but we can influence them

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### Cases



"Audit" is such an ugly word... I think that's why I like it."

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**Fenrich v. Blake School**

920 N.W.2d 195 (Minn. 2018)



- Facts:
  - 16 year old student was driving cross country teammates and team's volunteer coach to a non-league sponsored meet
  - Meet was listed on team's schedule and on team website
  - 16 year old driver crossed center line and killed driver of oncoming traffic
  - Estate brought suit against school district for negligence and negligent supervision

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**Fenrich v. Blake School**

920 N.W.2d 195 (Minn. 2018)



- Court looked to school's involvement, specifically:
  - Head coach strongly encouraged team to participate in post season meet
  - The asst coach paid registration fee
  - Coaches were active in meet prep
  - Asst coach took active responsibility for coordinating transportation and lodging

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**Fenrich v. Blake School**

920 N.W.2d 195 (Minn. 2018)



- School loses
- Court agreed with lower court that the school went beyond passive inaction by assuming supervision and control over cross country team's trip to Sioux Falls

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### Williams v. Weeping Water

Otoe Co. Dist Ct. 2015



- Club wrestling
  - Uses school facility
  - Uses school mascot
  - High school coaches also coach little guys
- Basketball hoop fell from ceiling and struck spectators
- Lawsuit sought \$4.5 million

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### Cambell v. Broken Bow

Custer Co. Dist Ct. 2014



- Summer basketball camp
  - High school coaches took team
  - Team used school uniforms
  - Team drove school vans
  - Team registered as "Broken Bow High Basketball"
- Motorist fell asleep and struck van
- Coach killed, students injured
- Lawsuit claim failure to follow handbook and negligent supervision

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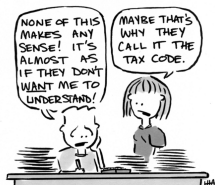
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### Groups and Taxation




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### Groups and Taxation



- Outside groups are not exempt from sales or use taxes and prohibited from using a school's exemption certificate to make tax-free purchases
  - Nebraska Department of Revenue, Publ'n No. 6-466-2007, Sales and Use Tax Responsibilities of Elementary and Secondary Schools, Parent-Booster Clubs, Parent-Teacher Ass'n and Student Org. 1-2 (Aug. 2007)
  - You might be tempted to allow an external "school group" use the school's tax exemption - DON'T SAY YES

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### Groups and Taxation



- Only tax-exempt sales for outside groups:
  - Admission to events during the regular school day or at approved school function
  - Meals and food products served during day or at school functions not open to public
  - Sales approved by school, if proceeds are used to support the school

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### Groups and Taxation



- "With very limited exemptions, both taxable and exempt nonprofit organizations making sales, including sales of donated items, **MUST** collect Nebraska and applicable local taxes on all sales."
  - NEB. DEPT OF REVENUE, PUBL'N 7-215-1992 REV. 11-2006, THE NEB. TAXATION OF NONPROFIT ORG. 2 (July 2006).
- Federal and state income tax exemption only upon IRS and NDOR approval

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### Groups and Taxation



- Penalties
  - Wrongful use of tax ID # may be considered tax fraud resulting in fines and/or jail time
  - Use of school's state Certificate of Exemption + willful failure to pay taxes can = personal liability for unpaid taxes, penalties, and interest
  - Liens, garnishment, property seizure

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### Groups and Taxation



- Potential Criminal Liability
  - Engaging in business as a retailer without the proper Nebraska sales tax permit is Class IV misdemeanor
  - Each day = separate offense, up to \$500 per day
  - Willful failure to collect, report, or remit sales tax is a Class IV felony
    - Max = five years, \$10,000 fine, or both

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### Whose Money Is It?



- PTO, chess club, senior class, activity, etc. funds in school account
- Auditor's Position
- 79-826 amended – students only
  - The school board may make expenditures for supplies, equipment, travel, meals, and lodging for school programs and activities, including extracurricular and interscholastic activities, appropriate for the benefit, government, and health of pupils enrolled in the school district

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**Whose Money Is It?**



- Senior class funds after graduation?
- GASB 84

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**Policy**



- Best way to protect against potential liability for claims associated with outside groups
- If the group fails to comply with the board's policy:
  - No recognition
  - No acceptance of funds
  - No use of school name or logo

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**Policy**



- Policy should include:
  - Formal recognition
  - Production of documents and information
  - Fundraising requirements
  - Use of students
  - Activity approval
  - Use of school facilities

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**Policy**



- Policy should include:
  - Donation provisions
  - Liability disclaimer
  - Insurance requirements
  - Audits
  - Preemptive Title IX provisions

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**Recommendations**



- Outside Groups
  - Written agreements with indemnity clauses
  - Keep school funds and group funds separate
  - Prohibit school employees from signing group's checks or acting on group's behalf

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**Recommendations**



- Outside Groups
  - Use influence to guide fundraising
  - "It Ain't Us" notice on flyers
  - "It Ain't Us" signed acknowledgments from parents and students

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### NPERS



"What was initially thought to be a simple process is in fact an incredibly complicated, intricate, and complex system that I've codified and organized into a few easy-to-follow rules that are more difficult to implement than you'd think."

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### NPERS Basics – Hours/Service Credit



- Hours matter to see if an employee qualifies as a NPERS participant
  - Any school employee who works more than 20 hours per week for 3 months in a school year is a mandatory participant in the system
  - \*regardless of employee preference

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### NPERS Basics – Hours/Service Credit



- *"The only way schools and NPERS can ensure timely enrollment is for the schools to track the hours worked, including extra duty hours of certificated employees (exempt under the FLSA) hired to work less than 20 hours per week, to determine whether these employees satisfy the requirements."*

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**NPERS Basics – Service Credit/Hours**



- Hours matter to see if an employee has a year of “creditable service” towards receiving a benefit
  - “...creditable service is computed on an hour-per-hour basis for each member who works up to 1000 hours in a plan year. (See, NRS § 79-927.)”

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**NPERS Basics – Service Credit/Hour**



- *“To ensure NPERS is paying the correct monthly retirement benefit, NPERS must have the schools accurately report the hours of service the members render – this includes the correct number of extra duty hours as it can make the difference between the member obtaining a full year of creditable service in a given plan year.”*

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**NPERS Basics - Compensation**



- Schools must deduct and withhold contributions for all employees each payroll period
  - *Failure to timely report can result in late fees and/or interest being assessed against the employer (See, NRS § 79-960.)*
- NPERS has to know when employees earned money to know when to begin crediting interest to that account

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**NPERS Basic - Compensation**



- "If contributions are not timely reported, then the correct interest cannot be assigned to the member's account. This could result in the member receiving less money than they should if the member elects to take a refund or rollover their "accumulated account balance." (See NRS §§ 79-902(1) and 79-957.)

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**NPERS Basics - Compensation**



- "Moreover, NPERS is required to charge an employer if delinquent reporting causes the employee to lose money because the contributions are not timely received." (See, NRS § 79-960.)

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**Tracking Coaching Hours - NPERS**



- Under new NPERS rules, ALL extra duty hours must be tracked
- Regardless of FLSA rules

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**Rules for Extra Duty Reporting**



- Three options:
  - Track hours and only pay in months when hours accrued;
  - Track hours and pay over 12 months; then file an amended retirement report at the end of the year; OR
  - KSB policy and assignment letter

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**KSB's Third Option: District Must Have Both**



- Board policy which provides:
  - Extra duty work performed in each of 12 months
  - Extra duty work begins June prior to school year
  - Extra duty paid over 12 months
  - (Also addresses the "Ag Teacher" problem)
- Individual "Extra Duty Assignment Letter"
  - Reiterating board policy provisions
  - Identifying assignments and pay for each
  - Maintained in employee's file

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**KSB Third Option Does Not Apply To:**



- Teachers who are expected to work less than 1,100 hours (about .7 FTE or less)
- Community member coaches
- Classified staff members who perform extra duty

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### Community Member Coaches



- FLSA does not require
  - Hours tracking
  - Compensation at minimum wage
  - Overtime
- NPERS NOW requires tracking hours
  - If employee works more than 20 hours in any three months of the school year, he/she must make NPERS contributions
  - Only gets a year of "creditable service" if employee works over 1000 hours in a school year

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### Student Workers



Casualty Friday.

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### Student Workers



- Employment Certificate for Minors, ages 14-15
  - Available on NE DOL website
- 14 and 15 year olds cannot participate in "hazardous occupations" (includes lawn mowing)
- Once a minor turns 16, there are no restrictions on working hours
- No employee under may drive on public roadways as part of job if employment is subject to FLSA

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# Questions?



"All of this raises what I think is a fundamental question - WTF, Tom?"

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