Important Information Regarding Pop Warner

In response to significant media attention and public concerns, the Oswego City School District makes the following statement: The City of Oswego Mayor’s office presented the Oswego City School District with a memorandum of agreement authorizing public funds from the City to be given to the District specifically to pay for legally mandated Sunday facility usage fees incurred by the Oswego Pop Warner Football Program. The District obtained an independent legal review and opinion on the matter. The Oswego City School District Administration, along with the Board of Education believe that providing this information will clarify any misunderstandings about the District’s response to the matter.

Re: Legal Services Agreement

I have been engaged to represent the School District in connection with issues involving the use of school district facilities and proposed funding by the City of Oswego for a private entity’s use of school district facilities, including a proposed “Memorandum of Understanding” (“MOU”) submitted by the City to the School District.

You ask whether the School District may accept and use funds the City earmarked to cover the expenses incurred by the School District for Sunday use of School District facilities by the Oswego Pop Warner organization.

It is my opinion that the funding included in the proposed MOU would result in an unconstitutional gift from a municipality and the school district to a private entity.

BACKGROUND

The Oswego School District strives to “encourage the greatest possible use of school facilities for community-wide activities.” (see, Oswego School District Board of Education Policy Manual, § 3280 “Use of School Facilities, Materials and Equipment.”)

Section 414(1) of NYS Education Law lists several “permitted uses” of school buildings and grounds, each having some public purpose. For example:

- Instruction in any branch of education, learning or the arts.
- Social, civic, and recreational meetings and entertainments, and other uses serving the welfare of the community which are nonexclusive and open to the general public.
Polling places for holding primaries and elections, and for the registration of voters.

Recreation, physical training, and athletics, including competitive athletic contests of children attending private, not-for-profit schools.

Public library purposes.

Under the Education Law, the particular use must not disrupt normal school operations or damage school buildings, grounds, and other property.

The Education Law empowers local Boards of Education to determine the terms and conditions for community use of their school facilities. These terms “may include rental at least in an amount sufficient to cover all resulting expenses…” (Educ. Law §414(2)). Under Oswego School District policy,

Groups wishing to use the school facilities must secure written permission from the Board of Education or its designee and abide by the rules and regulations established for such use including restrictions on alcohol, tobacco and drug use. The District reserves the right to charge a fee for the use of its facilities in a manner consistent with law, and on terms specified in regulations or by agreement with such organizations. (Oswego School District Board of Education Policy Manual, § 3280, emphasis added.)

The School District does not charge rent to use its facilities on weekdays and Saturdays, because it does not incur more expenses to open and run school facilities during those days. Normal school operations, including instruction and extra-curricular activities, occur in school facilities from Monday through Saturday.

The School District budget, approved by city voters each year, covers facility and staffing expenses incurred in the ordinary course of school activities on weekdays and Saturdays. Historically, community groups have not looked to use School District facilities on Sundays. Sunday facility use will cause the School District to incur added unbudgeted expenses, such as overtime labor costs.

The Oswego Pop Warner football organization has used Oswego School District facilities for many years for its youth football and cheerleading programs. These recreation and athletic programs are clearly within the “permitted uses” of school facilities allowed by the Education Law. In the past, until the fall of 2018, Pop Warner held its events at school facilities on weekdays or Saturdays, with no rental fee charged to it.

The School District looked to accommodate Pop Warner’s unique need for Sunday access to school facilities. Consistent with its policy and state Education Law, and because Sunday facility use resulted in added, unbudgeted expenses, the School District charged Pop Warner a fee to use the school facilities on Sunday to cover the resulting added expenses. The School District, however, will continue to make its facilities available to Pop Warner on weekdays and Saturdays at no charge.

The City of Oswego wants to use city funds to pay the fee charged by the School District for Pop Warner’s desired Sunday facility use. On September 23, 2019, the Oswego City Council
approved a resolution authorizing a MOU where the City will pay the School District “to cover the cost charged to POP WARNER for the use of OMS [Oswego Middle School] playing field and facility for the balance of the 2019 season, and the entire 2020 season.”

In explaining the resolution, an Oswego public official recognized that the City could not give money directly to Pop Warner to cover the school district facility fee for Sunday use because of New York State’s constitutional restriction on gifts of public funds to private entities. The City looks to evade the legal gift prohibition by casting the grant as funding for the school district.

The proposed MOU, however, names Pop Warner as the intended beneficiary of the public financing. Public comments made by Oswego City officials in the run-up to the vote authorizing the proposed MOU emphasized that Pop Warner is the intended beneficiary of the public funds at issue.

DISCUSSION

The New York State Constitution governs the use of municipal resources. The Gift and Loan clause of the Constitution states, in part, “[n]o 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.” (N.Y. Const. Art. VIII, §1. See also, N.Y. Const. Art VII, §8(1), which similarly prohibits the use of state funds for private purposes.)

The constitutional limitation against municipal gifts recognizes that the role of a public official is to serve the public, just as the function of municipal resources is to benefit the public. Indeed, the City of Oswego sets forth a code of conduct for its public officials intended to prevent any use of public office for private gain, as mandated by the constitution and basic public ethics.


If municipal funds are used to supply a purely private benefit, they are not being used for a governmental purpose. (see, e.g., Union Free Sch. Dist. No 3 of Town of Rye v. Town of Rye, 280 N.Y. 469, 474 [1939], holding that “[p]ublic monies should be used for public purposes; therefore, gifts or loans of public money or property may not be made to an individual or private corporation....”)

While the presence of a private benefit does not automatically render the action invalid, the primary beneficiary of the municipal spending or use of municipal resources must be the public. (Schultz, 189 A.D. 2d at 122.)

There is no exception to the constitutional prohibition against municipal gifts for not-for-profit organizations, such as Pop Warner, (see, 1986 Opns St Comp No. 86-44, p. 72), even if the activities of the nonprofit corporation serve a laudable purpose. (see, e.g., 1986 Opns St Comp No. 86-70, p. 109.)

On the other hand, there are no prohibitions against gifts of money to a public corporation for a public purpose. (see, Town of Rye, 280 N.Y. at 474.)
The legality of government funding of private entities depends on whether the primary use of the funds is for the private entity’s benefit or the public good. Various court opinions, informal Attorney General Opinions, and informal Comptroller’s opinions supply guidance and suggest that defining “public purpose” depends on whether the primary beneficiary is the public or a private entity.

Pop Warner is a private nonprofit “youth football and cheerleading organization.” (see, https://www.facebook.com/oswegopopwarner/).\(^1\) As such, it supplies a private service to a limited constituency, although that service has a potential public benefit. Pop Warner met a need that is not encompassed by the School District policy of general facility availability on weekdays and Saturdays. Pop Warner’s singular request for Sunday use of facilities for its will cause the District to incur added, unbudgeted expenses.

As a preliminary matter, given that the school district will incur additional, unbudgeted expenses in making its facilities available on Sundays, it cannot, under the Gift and Loan clause of the Constitution, provide rent-free access to its school facilities on Sundays to Pop Warner, or any other private civic group. It must charge rent to cover the added expenses to open and run school facilities on Sundays. (See, Educ. Law §414(2).) See also, 2004 Opns St Comp No. 6, where the State Comptroller opined that a Village could not permit a nonprofit historical society to use part of a village building without paying rent, or providing other consideration in the form of services to the Village, no matter how laudable the mission of the historical association.)

Similarly, as acknowledged by City Officials during the lead-up to its vote authorizing the proposed MOU, the Gift and Loan clause of the Constitution prohibits the City from making a direct grant to Pop Warner to cover the Sunday school district facility rent.

Here, the City tries to mask a direct payment to Pop Warner for its Sunday use of school facilities as a gift or grant of money to the School District. The proposed MOU, however, designates the funds for the benefit of Pop Warner only, and not for the community at large, making it clear that the public expense is for the benefit of a private entity with a specific individual purpose, that is, to use school facilities on Sundays.

Even if the MOU was silent on the use of the funds at issue, comments made by Oswego City officials in social media and during city council deliberations made it clear that the city intended its proposed funding to cover Pop Warner’s Sunday use of school facilities. Under those circumstances, the “form” of the transaction would not hide its substance as a benefit for a private organization.

CONCLUSION

Based on the preceding, it is my opinion that the proposed MOU directs both the city and the school district to make a prohibited gift to Pop Warner.