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Model Statute Limiting Food Marketing at Schools

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Introduction

The prevalence of U.S. children and adolescents who are obese, have type 2 diabetes, or are at risk for serious health problems in adulthood (including heart disease, cancer, and stroke) continues to be a pressing public health concern.¹ A child's environment plays a powerful role in his or her long-term eating patterns, preferences, and overall health. In addition, studies demonstrate a relationship between healthy eating, regular physical activity, and students' academic success.² The Centers for Disease Control and Prevention reports that students who are physically active and eat a more nutritious diet receive higher grades than their classmates who are physically inactive and eat foods that are less nutritious.² Finally, obesity-related health conditions have serious economic costs. In 2008, the medical costs of adult obesity were estimated to be \$147 billion per year.³ Without effective interventions, researchers expect these costs to rise by \$48 to \$66 billion by 2030.⁴

Food Marketing to Children in Schools

The marketing of foods of poor nutritional value to American children increases children's risk of developing chronic diseases by affecting their food preferences, choices, and diet.⁵ Moreover, unhealthy food and beverage marketing often disproportionately targets Latino and African American youth, who are also hardest hit by diabetes and obesity.⁶ The Federal Trade Commission found that in 2009 food and beverage manufacturers spent nearly \$149 million on youth-directed in-school marketing, although it believes that figure underestimates the actual amount of spending.⁷ Food marketing in schools includes branded food sales; direct advertising on school property and facilities (through television, radio, posters, and print advertising); exclusive agreements to sell only products from a particular manufacturer; sponsorship of school programs, incentive programs, and supplementary educational materials; fundraising programs; free samples and coupon giveaways; and digital marketing.⁸ School-based marketing is "designed specifically to increase children's affinity and desire for companies' products by increasing familiarity and positive associations with the brands."⁹

Research demonstrates that children are particularly vulnerable to advertising. Children under eight do not have the cognitive ability to discern that advertising presents a biased point of view.⁹ Older children and adolescents understand the intent of advertising, but resisting advertising for the types of foods most commonly advertised requires the ability to "weigh long-term health consequences of consumption against short-term rewards," an ability that young people do not fully develop until their early 20s.⁹

Restrictions on Food Marketing in Schools

Recognizing that the academic success of America’s youth is strongly linked with their health, the federal government, states, and schools have worked hard to make the school environment healthier. Under the Healthy, Hunger-Free Kids Act of 2010 (“HHFKA”), Congress required the U.S. Department of Agriculture (“USDA”) to set new nutrition standards for school meals and all “competitive foods,” that is, all foods sold on campus during the school day other than the meals provided under the National School Lunch Program and the School Breakfast Program.¹⁰ The HHFKA allows states and school districts to set requirements that exceed those minimum nutrition standards.

The HHFKA also set new requirements for school wellness policies, which all local educational agencies that participate in the National School Lunch or Breakfast Program must meet. On July 29, 2016, the USDA published the final rule implementing the new wellness policy requirements.¹¹ Among other requirements, the final rule mandates that, at a minimum, each wellness policy contain guidelines that permit marketing on campus during the school day of only those foods and beverages that meet the federal nutrition standards.¹¹ School districts must fully comply with the rule by June 30, 2017.

Why Enact a State Law or Board of Education Rule?

The federal regulation provides a starting point for eliminating unhealthy food marketing in schools, but adopting a state-level policy offers several advantages. First, the federal regulation does not define marketing or explain what activities are covered by the prohibition. A state law or regulation would provide guidance to school districts to ensure that schools throughout the state adopt the same minimal standards to create the healthy environments all students deserve. In addition, passing a state law or regulation ensures that school environments continue to promote student health in the event federal regulations change.

Legal Landscape

As described above, federal law now requires schools participating in the federal nutrition programs to restrict the marketing of foods and beverages to students on campus. States, too, have the authority to regulate the practices of school districts, including regulating marketing at schools. Opponents might attempt to raise objections under the First Amendment to the U.S. Constitution, which prohibits the government from making laws that abridge the freedom of speech, including advertising. Although the First Amendment affects what government can do about advertising in public places, a well-crafted law prohibiting all marketing activities or the marketing of certain types of products at schools

would likely survive a First Amendment challenge. Because of the unique educational mission of schools, the First Amendment leaves a lot of leeway for the government to regulate the types of commercial messages that are allowed on school grounds.¹² To minimize the chance of running into First Amendment problems, the model statute provides sound justifications – such as efforts to promote good health habits among students and support the curriculum – to support the law. This model statute also sets forth precise guidelines about what will and will not be permitted.*

For more information or questions about the First Amendment, please contact [ChangeLab Solutions](#) for assistance.

Understanding the Model

The model statute prohibits the marketing of foods or beverages that may not be sold on the school campus during the school day. The language in the model statute is designed to be tailored to the needs of a particular state. The *italicized* language in [*brackets*] provides different options or explains the type of information that needs to be inserted in the blank spaces to customize the statute. The “comments” provide additional information and explanation. While the model is designed as a statute, it could be enacted as a state board of education regulation. These requirements can also be adopted at the school district level as a policy by a board of education or as part of a school wellness policy. For sample school wellness policy language addressing unhealthy marketing in schools, please visit www.changelabsolutions.org/publications/district-policy-school-food-ads.

* Oregon law may be different. Advocates in Oregon wishing to go beyond the minimum federal standards should contact ChangeLab Solutions or a local attorney for more information.

Model Statute: Food Marketing at Schools

AN ACT TO LIMIT THE MARKETING OF FOODS AND BEVERAGES AT SCHOOLS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF [_____]:

SECTION ONE. Findings:

The Legislature finds and declares the following:

- (a) Today, one-third of American children and adolescents are obese or above a healthy weight.¹³ In ____ [state] ____ percent of children are obese or above a healthy weight. Obesity increases children’s risk factors for certain chronic health conditions, including heart disease, type 2 diabetes, asthma, and cancer.¹

Several organizations provide state-specific information on obesity rates. One resource is Trust for America’s Health. Information is available at:

<http://healthyamericans.org/report/98/obesityratesbystate>.

A resource specifically for childhood obesity data by state is the 2011 National Survey of Children’s Health. Information is available at:

<http://childhealthdata.org/browse/allstates?q=2612>.

- (b) In addition to harming individual health, obesity hurts the economy by contributing to higher health care costs and lost labor market productivity.¹⁴ In 2008, the annual medical costs of adult obesity were approximately \$147 billion.³ Without effective interventions, researchers estimate that these costs could rise by \$48 to \$66 billion by 2030.⁴
- (c) The marketing of foods of poor nutritional value to American children contributes to the rise in unhealthy weights of children by affecting children’s food preferences, choices, and diet.⁵ In 2009, food and beverage manufacturers spent about \$149 million on youth-directed in-school marketing, although that figure likely underestimates the actual amount of spending.⁷ Children are particularly vulnerable to advertising because their cognitive abilities are not fully formed until their early 20s.⁹
- (d) The mission of our schools is to educate our children. Increasingly, studies demonstrate a relationship between healthy eating, regular physical activity, and

students' academic success.² The Centers for Disease Control and Prevention reports that students who are physically active and eat a nutritious diet receive higher grades than their classmates who are physically inactive and eat foods that are less nutritious.² Helping students to stay healthy promotes academic success.

- (e) Federal law requires schools to prohibit the on-campus marketing to students of foods and beverages that do not meet federal nutrition standards.¹¹ The Legislature intends, by enacting this statute, to comprehensively address marketing in schools and provide minimum standards and guidance to school districts to ensure that all schools maintain a healthy environment for all students.

SECTION TWO. [State Code] is hereby amended by adding thereto a new chapter to read as follows:

CHAPTER [__]

Section _-1.

(a) Definition.

- (1) "Brand" means a corporate or product name, a business image, or a mark, regardless of whether it may legally qualify as a trademark used by a seller or manufacturer to identify goods or services and to distinguish them from competitors' goods.
- (2) "Foods and beverages that may not be sold on the school campus during the school day" means foods and beverages that do not meet the minimum nutrition standards for foods sold outside the school meal programs as set forth by the United States Department of Agriculture under the Healthy, Hunger-Free Kids Act of 2010 and federal regulations implementing the Act [42 U.S.C. section 1779(b)];

COMMENT: The USDA regulations set minimum nutrition standards, allowing states to set higher standards if they choose. In the event a state has a law exceeding the national competitive food standards, the following language should be used in the statute:

For purposes of this statute, foods and beverages that may not be sold on the school campus during the school day are those that do not meet the minimum nutrition standards as set forth under [state law section(s)].

As noted above, districts must have wellness policies that establish nutrition guidelines for all foods available on each school campus during the school day with the objectives of promoting student health and reducing childhood obesity.¹⁵ Any nutrition guidelines included in a wellness policy must be consistent with or exceed the USDA nutrition standards.¹⁵ Some states may wish to allow school districts to establish marketing standards that reflect the nutrition standards in district wellness policies. If so, the following language could be used in the statute:

For purposes of this statute, foods and beverages that may not be sold on the school campus during the school day are those that do not meet the nutrition standards as set forth under the District wellness policy, provided that those standards are consistent with or exceed the minimum nutrition standards for foods sold outside the school meal programs as set forth by the United States Department of Agriculture under the Healthy, Hunger-Free Kids Act of 2010 and federal regulations implementing the Act. [42 U.S.C. section 1779(b)].

- (3) “Marketing” means an oral, written, or graphic statement or representation, including a company logo or trademark, made for the purpose of promoting the use or sale of a food or beverage product by the producer, manufacturer, distributor, seller, or any other entity with a commercial interest in the product. “Marketing” includes, but is not limited to, television, print, and digital displays (e.g., digital signs, desktop and laptop computers, and tablets); placement of logos on fixtures, equipment, supplies, and uniforms; free samples or taste tests; product coupons; educational incentive programs; sponsorships of school activities, fundraisers, or sports teams; and company product research.
 - (4) “School campus” means any property or facility owned or leased by the school district or school and used at any time for school-related activities, to which students have access. “School campus” includes, but is not limited to, school buildings, athletic fields, facilities, signs, scoreboards, or parking lots, or any school buses or other vehicles, equipment, and vending machines.
 - (5) “School day” means the period of time from the midnight before to 30 minutes after the end of the instructional day.
- (b) Food and beverage marketing on school campus.** Except as provided in subsection (c), a [school superintendent] [fill in name of authority] shall prohibit at any school within the district:

- (1) the marketing, [*during the school day / at any time*], of any food or beverage that may not be sold on the school campus and of any corporate brand, unless every food and beverage product manufactured, sold, or distributed under the corporate brand name [*or by any of the corporate brand's subsidiaries and affiliated corporations*] can be served or sold on the school campus during the the school day [*or the marketing features only specific products that can be served or sold on the school campus during the school day*];

COMMENT: The model statute eliminates the marketing of foods that do not meet the federal Smart Snack standards. It also eliminates the marketing of corporate brands that do not refer to specific foods and beverages unless all of the foods and beverages the manufacturer sells under the brand meet the nutrition standards. However, it offers states the option to allow brand marketing if the marketing only features specific products that do meet the Smart Snacks standards (e.g., fruits, vegetables, and water).

Brand marketing is the most prevalent type of marketing on school property. Without addressing brand marketing, companies that sell foods and beverages that do not meet the Smart Snacks standards may still be permitted to display their corporate logos around campus, thereby promoting its unhealthy products as well as healthy products.

- (2) the [*participation in / on-campus promotion of*] a corporate incentive program that rewards children with free or discounted foods or beverages that may not be sold on the school campus during the school day when they reach certain academic goals; or
- (3) the [*participation in / on-campus promotion of*] corporate-sponsored programs that provide funds to schools in exchange for consumer purchases of foods and beverages that may not be sold on the school campus during the school day.

COMMENT: Particularly in elementary and middle schools, food and beverage marketing occurs through incentive programs and corporate fundraising programs. A study of elementary and middle schools in the United States found that fundraising programs were the most common marketing activity in the primary schools.¹⁶ The study found that 37.7 percent of primary schools reported participating in a fundraising program with a corporation that sells foods high in fat or sugar or foods with minimal nutritional value.¹⁶ Second most common were incentive programs, with 31.6 percent of primary schools reporting participation in an incentive program.¹⁶ The model prohibits schools from promoting such programs on campus. Some states may wish to prohibit school participation in the programs, so optional language is provided to do so.

(c) **Exceptions:** The restriction on marketing in subsection (b) shall not apply to:

- (1) Marketing in broadcast, digital, or print media produced outside of the school, which is used as an educational tool;
- (2) Marketing on clothing with brand images worn on school grounds; or
- (3) Marketing contained on product packaging.

COMMENT: The model statute does not prohibit marketing that is contained in print, broadcast, or digital media, over which the school has no control, because these media may be valuable learning resources. The model statute does prohibit marketing on media that are controlled by the school, or written or created by students or school personnel, such as school publications, school broadcasts, or school websites.

(d) **Enforcement.** *[Any person or persons, firm or corporation, resident in any school district, paying taxes to such political unit, may institute suits or actions at law for an injunction preventing a violation of this section and an accounting and/or the recovery of funds received or expended in violation of this section.]*

COMMENT: Methods of enforcement of education laws vary by state. Whether this statute needs a specific enforcement clause is dependent upon each state's statutory and case law.

To help to ensure that schools comply with the law, as well as for accountability purposes, the model identifies the individual (the school district superintendent or comparable official) responsible for carrying out the statute. If the official does not comply with the statute, the board overseeing and employing the superintendent may take disciplinary action. Members of the public who are concerned with any violations can also raise the issue at a school board meeting, enabling the community to participate in oversight.

In addition, in many states an individual may bring a taxpayer's action to prevent the district from entering into or set aside illegal or unauthorized contracts. Taxpayer's actions may also be brought to prevent, set aside, or recover funds from other unauthorized acts of a school superintendent. This model provides optional language to expressly provide that violation of this law is a basis for a taxpayer's action.

COMMENT: Some citizens believe that any marketing in schools conflicts with the mission of the school system. Accordingly, a state legislature may wish to ban all types of marketing at schools. As described above, a complete ban on marketing should survive a First Amendment or other legal challenges. Implementing a complete marketing ban can be more complex than banning unhealthy foods and beverages, because athletic uniforms, sports and office equipment, and supplies often contain logos or product branding. If you are interested in a complete ban on marketing in schools, please contact [ChangeLab Solutions](#) for assistance.

- (e) **Local School Wellness Policies.** *[Nothing in this Act shall prohibit local school districts or individual schools from implementing more stringent standards than those described herein to protect students from food and beverage marketing in schools.]*

COMMENT: This model statute includes anti-preemption language that expressly allows local school districts and individual schools to go beyond the marketing restrictions outlined in this statute. Depending on where this Act is codified within the state's Education Code, this anti-preemption language may not be necessary if it is already clear in state law that local school districts and individual schools are allowed to adopt more stringent restrictions in their local school wellness policies than those outlined in state law. However, if there is any question as to whether local school districts or individual schools have the authority to adopt more stringent standards, then this anti-preemption language may be appropriate. If you have questions about preemption or whether this anti-preemption provision is applicable in your state, please contact [ChangeLab Solutions](#) for assistance.

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