



## Restricting Unhealthy Food and Beverage Advertising on School Buses

### The First Amendment and Defining Junk Food

*Some states now permit ads on school buses. But parents, public health advocates, and others concerned about childhood obesity can act to prohibit ads for unhealthy food and beverages.*

The iconic yellow school bus is becoming another victim of the recession.<sup>1</sup> Strapped for cash, a number of states (including Colorado,<sup>2</sup> New Jersey,<sup>3</sup> Texas,<sup>4</sup> and Utah<sup>5</sup>) now allow districts to sell advertising space on the exterior sides of school buses. Missouri<sup>6</sup> is considering adopting legislation allowing advertisements on the exterior and interiors of school buses.

Some states that permit advertising on school buses restrict certain types of ads. Utah, for example, requires any advertising to be “age-appropriate” and prohibits “promotion of any substance or activity that is illegal for minors, such as alcohol, tobacco, drugs, or gambling; promotion of any political party, candidate, or issue; or sexual material.”<sup>7</sup> New Jersey prohibits advertisements for tobacco or alcohol products or for political advocacy.<sup>8</sup>

In areas that have permitted ads on school buses, parents and others concerned about childhood obesity are asking whether the government can prohibit ads for unhealthy food and beverages.



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## School Advertising Revenue

Advertising at schools is a fairly controversial issue. Some citizens believe that advertising in schools conflicts with the mission of the school system; others believe that in tight times, the need for revenue outweighs those concerns. There is little, if any, public data on how much revenue has been raised specifically by school bus advertising. A recent report from Public Citizen found that school districts that have turned to advertising on school property to raise funds have received minimal revenue, particularly compared to their total operating budgets.<sup>9</sup>



## The First Amendment and School Bus Ads

Although the First Amendment restricts what government can do about advertising, a well-crafted law banning the advertisement of certain types of products on the sides of school buses would likely survive a First Amendment challenge.<sup>10</sup> The First Amendment to the U.S. Constitution prohibits the government from making laws that abridge the freedom of speech, which includes advertising. Generally, the government may not favor certain types of messages over others. However, if speech occurs in a “nonpublic forum,” the government has more leeway to distinguish between messages.<sup>11</sup> A “nonpublic forum” is a place—like a post office, military base, or school—that is not typically open to expressive activity.<sup>12</sup> In a nonpublic forum, a government may restrict certain types of speech, and therefore advertising, provided that the restriction has a reasonable basis and is not based on a particular speaker’s viewpoint.<sup>13</sup>

So, a law permitting advertising on school buses but prohibiting ads for junk food, alcohol, and/or tobacco must be supported by a legitimate reason.<sup>14</sup> A state could justify such a policy based on its desire to raise

revenue without undermining the educational mission of the schools and its efforts to promote good health habits among students. The law must also set forth precise guidelines for what will and will not be permitted in order to prevent arbitrary or capricious discrimination against particular speakers and to ensure that the law is implemented fairly.<sup>15</sup>

## Defining Junk Food

States that want to prohibit junk food advertising on school buses have several options for defining which food advertising is prohibited.

A state could use the standards being developed by the U.S. Department of Agriculture (USDA) as directed by Congress under the Healthy, Hunger-Free Kids Act of 2010. The act, which reauthorized the federal child nutrition programs, requires the USDA to set nutrition standards for all “competitive foods,” that is, all foods sold on campus that are not part of the reimbursable meals provided under the National School Lunch and Breakfast Programs.<sup>16</sup> The USDA is set to issue its draft competitive foods regulations imminently. A state could prohibit advertisements for any foods and beverages that are not permitted to be sold on campus under the USDA regulations. Using the USDA regulations serves to reinforce Congress’ intent that schools “safeguard the health and well-being of the Nation’s children.”<sup>17</sup>

Many states have their own laws regulating the types of competitive foods that may be sold on campus.<sup>18</sup> A state could prohibit advertisements on school buses for any foods or beverages that it does not allow to be sold on campus. (Many states, however, may need to review their laws on competitive foods once the USDA adopts its final standards.)



Alternatively, a state could delegate to local school districts the authority to determine what types of advertising to permit. Under federal law, each local educational agency is required to develop a “wellness policy,” which must include nutrition guidelines for all foods sold on campus.<sup>19</sup> A state could prohibit advertisements on school buses for foods and beverages not permitted under the district’s wellness policy.

To be comprehensive, a state may want to consider addressing advertising not only for specific products but also for brands representing multiple products (for example, advertising for a fast food company as opposed to advertising for a specific menu item). This approach could entail excluding all brand advertising<sup>20</sup> or setting a certain percentage of products within a brand that must meet the nutrition standards in order for the brand to be allowed on ads.<sup>21</sup>

Ultimately, if school buses are going to become mobile billboards, parents and public health advocates can work with policymakers to exempt ads for harmful products, including unhealthy foods and beverages.



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<sup>1</sup> The color yellow was selected for school buses at the first national standards conference for school transportation in 1939 because black lettering on yellow is easiest to see in the semidarkness of early morning and late afternoon. “The Father of the Yellow School Bus: Frank W. Cyr, Ph.D.” Spaulding Center for Transportation: The Heroes Center. Available at: [www.transportationheroes.org/heroDetail.php?id=19](http://www.transportationheroes.org/heroDetail.php?id=19).

<sup>2</sup> 1 Colo. Code of Regs. § 301-25

<sup>3</sup> New Jersey Stats. Ann. § 18A:39-31.

<sup>4</sup> Vernon’s Texas Code Ann. Transportation Code § 547.701.

<sup>5</sup> Utah Code Ann. § 41-6a-1309.

<sup>6</sup> H.B. 1273 School Bus Advertisements (Kelley) Mo. Legs. 2011–2012.

<sup>7</sup> Utah Code Ann. § 41-6a-1309.

<sup>8</sup> New Jersey Stats. Ann. § 18A:39-31. New Jersey also prohibits “any other advertisements for products or services or by sponsors that the Commissioner of Education deems inappropriate.” *Id.*

<sup>9</sup> Ben-Ishai E. *School Commercialism: High Costs, Low Revenues*. Public Citizen, February 2012. Available at: [www.commercialalert.org/PDFs/SchoolCommercialismReport\\_PC.pdf](http://www.commercialalert.org/PDFs/SchoolCommercialismReport_PC.pdf).

<sup>10</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (holding that the city transit system was not a public forum under the First Amendment and that refusal to accept political advertising did not violate the First or Fourteenth Amendments).

<sup>11</sup> *Id.* at 303–304; see also *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–393 (1993) (citation omitted) (“[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral”).

<sup>12</sup> *Lehman v. City of Shaker Heights*, *supra*, 418 U.S. 301–304 (holding that the city could restrict political advertisements on transit cars because they were not a public forum); *Diloreto v. Downey Unified Sch. Dist.*, 196 F.3d 958 (9th Cir. 1999) (holding that the school district could refuse to post a paid advertisement containing the text of the Ten Commandments on a fence on a school baseball field because the fence was a nonpublic forum).

<sup>13</sup> *Lehman v. City of Shaker Heights*, *supra*, 418 U.S. 303–304.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 42 U.S.C. 1779(b).

<sup>17</sup> 42 U.S.C. 1751.

<sup>18</sup> See, e.g., Calif. Educ. Code § 49431.2 (setting nutrition standards for competitive foods sold at middle and high schools).

<sup>19</sup> 42 U.S.C. 1751.

<sup>20</sup> See, e.g., National Policy & Legal Analysis Network to Prevent Childhood Obesity. *District Policy Restricting the Advertising of Food and Beverages Not Permitted to Be Sold on School Grounds*. Available at: [www.changelabsolutions.org/publications/restricting-advertising-food-and-beverages-not-sold-school-grounds](http://www.changelabsolutions.org/publications/restricting-advertising-food-and-beverages-not-sold-school-grounds).

<sup>21</sup> See, e.g., Center for Science in the Public Interest. *Model State Legislation: Food Marketing in Schools*. Available at: [www.cspinet.org/nutritionpolicy/modelStateLegislation\\_noAds.doc](http://www.cspinet.org/nutritionpolicy/modelStateLegislation_noAds.doc).