

VII. ADVERTISING ON SCHOOL CAMPUSES— A LEGAL Q & A

Limiting or banning advertising in schools is a complicated legal issue. The following Q&A has been developed by the Public Health Law Program to assist community-based organizations, local public health departments, schools and other entities in creating groundbreaking policy solutions for critical public health challenges.

Question 1:

Is it possible for a school district in California to limit or totally ban advertising of nonnutritious foods and beverages on school property?

Answer:

Yes, there are two ways a school district can accomplish one or both of these goals. The first way is by contract, which results in a limitation of advertising of nonnutritious foods and beverages on a contract-by-contract basis.

When a school district permits a private vendor to sell food or beverages on school campuses, they usually do so by entering into a commercial contract with that outside vendor. A school district that enters into such a contract has the right to request that, in exchange for the right to sell its products on school property, the vendor agree to certain conditions, including an agreement not to advertise or market nonnutritious foods or beverages on school property.

Question 2:

Are there any special contract terms that should be included in such a contract?

Answer:

Yes, the contract should include language that:

- Prevents the vendor from challenging any portion of the contract, including the advertising restrictions, such as:
 - “In consideration for the benefits provided hereunder, [VENDOR] agrees not to challenge any provision of this contract.”

- Creates a disincentive for the vendor to fund or otherwise encourage a third party challenge to any portion of the contract, including the ban, such as:
 - “If any provision of this contract is held or declared invalid, the entire contract shall be void and the privileges granted hereunder to [VENDOR] shall lapse.
- Incentivizes the vendor to comply with the advertising restriction, such as:
 - “Failure to comply with [advertising restriction] as required under this section shall be deemed to be a material breach of this contract which will subject the contract to immediate termination at the [SCHOOL BOARD’s] sole option”.

Question 3:

What’s the second way a California school district can control advertising of nonnutritious foods and beverages on school property?

Answer:

The school district can approve a district-wide policy that bans advertising of nonnutritious foods and beverages on school property by outside advertisers, regardless of whether they have a contractual relationship with the school. For example, the school board could draft a policy that says: “If the food or beverage cannot be sold on campus because it does not meet SB 12/965 standards (or a more restrictive food and beverage standard adopted by the school board), then the food or beverage cannot be advertised either.”

School board policies are an essential first step because they are a fundamental means by which school boards establish a vision for their schools; maintain an effective organizational structure; ensure uniformity and consistency within the district; and ensure accountability to the public over the school board's actions.

To be legally sound, the policy should include some introductory language about the school board's educational purposes in enacting the advertising restrictions. These purposes, at a minimum, should include:

- Promoting an educational rather than a commercial environment;
- Dissociating itself from speech that could be inconsistent with its educational mission;
- Preventing school facilities from becoming a place where commercial vendors debate the topic of nonnutritious foods or beverages;
- Preventing the commercial exploitation of students; and avoiding the appearance of endorsing any particular food or beverage product.

Also, the resolution should include a requirement that all of the district's contracts be consistent with this policy.

Question 4:

But what about the First Amendment? Wouldn't it be a violation of the advertiser's freedom of speech if a school district banned advertising?

Answer:

No, it wouldn't be a violation of the advertiser's right to free speech. Because public schools have a basic and far-reaching educational mission, the United States Supreme Court has recognized that schools have a considerable amount of power to control speech that takes place on school property.

The First Amendment is most protective of speech that takes place in "public forums." A public forum is a place that, like a public park or city square, has for many years been made available to and used by a wide array of speakers. But in places that the government has not traditionally made available to private speakers, known as "non-public forums," the government has significantly more latitude to regulate speech.

The Court has ruled repeatedly that K-12 schools are non-public forums. As a result, a public school has substantial leeway to regulate—in furtherance of its educational mission—what gets said and by whom on school property.

Question 5:

Are there any limits on a school district's power to regulate advertising on campus?

Answer:

Yes. School districts must adopt policies about advertising on campus that are both reasonable and viewpoint neutral. Generally speaking, a reasonable and viewpoint neutral policy would likely be one that is appropriate to and reflective of the school's educational concerns and also treats all sides of a topic in a similar manner.

For example, assume that all schools in a district only sell foods and beverages allowed under SB 12/965. Within this context, a reasonable and viewpoint neutral advertising policy adopted by that district might say: "As part of our mission to promote the health and welfare of our student body, School District X will not permit third parties to advertise or promote the consumption of beverages containing more than 42 grams of sugar per 20 ounces. Likewise, the District will not permit third parties to advertise or promote against the consumption of beverages containing more than 42 grams of sugar per 20 ounces."

In practical terms, this example means that the Coca-Cola Bottling Company would not be allowed to take out an advertisement imploring students to drink certain Coca-Cola products on campus, while at the same time, the American Diabetes Association would also not be allowed to take out an advertisement imploring students not to drink certain Coca Cola products.

Question 6:

What if the school itself wants to present an educational curriculum or stage a debate at a school assembly about the health risks and benefits associated with eating or drinking certain foods or beverages?

Answer:

The school is free to do so. As mentioned previously, because public schools have a basic and far-reaching educational mission, they are free to frame issues and present educational materials as each school sees fit. Just because the school has limited a third party's access to "speaking" (that is advertising) on campus does not at the same time mean that the school's ability to express its own views on controversial or educational topics is limited.

For example, the same school district that prohibited the American Diabetes Association from taking out an advertisement imploring students not to drink sodas could itself invite a representative from that organization to make an instructive presentation to a health education class in order to discuss the health risks associated with drinking too much soda.

Question 7:

Are there any California state laws that regulate advertising in schools?

Answer:

Yes, California Education Code §35182.5 directly controls how school districts and schools within a district can enter into a

contract that grants advertising rights to a person, business or corporation. The law applies to all advertising in schools, not just to nonnutritious food and beverage advertising, and applies to a contract even if advertising is neither the sole nor main purpose of the contract.

The main points of the law include the requirement that prior to entering into a contract that involves advertising rights, the school board must hold public hearings, adopt a specific policy containing certain legally mandated elements (e.g., ensuring that public funds will be safeguarded, dedicating monies raised to an educational purpose, and engaging in competitive procurement practices), and only enter into contracts that meet certain requirements set forth in the legislation (e.g., no confidentiality clause and no anti-disparagement clause).

Because California Education Code §35182.5 mandates that the public be given advance notice of a school's plan to sell advertising rights on school property and also be given an opportunity to comment on that plan, this particular law gives parents and educators a powerful tool to prevent or influence what and how foods, beverages, and other commercial products are advertised in their schools.

For further technical assistance regarding school vending contracts, you may want to seek advice from the school district's legal counsel or contact Debora Pinkas, Staff Attorney, Public Health Law Program, Public Health Institute, at (510) 302-3353.

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