



Healthy Foods and Environmental Justice

The Wheels on the Bus Go “Buy Buy Buy”: School Bus Advertising Laws

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School buses, a practical necessity for millions of children, are at the center of new efforts to raise revenue. School bus advertising laws bring public health and commercialization concerns to the school setting. In doing so, they potentially expose school districts to First Amendment lawsuits.

I examined various school bus advertising bills and laws. I reviewed First Amendment “forum analysis” as applied in the transit and school settings to clarify how this legal test may affect school districts subject to such laws.

I have made recommendations for school districts to enact appropriate policies to ensure that such advertising does not undermine public health and to enable the districts to maintain control over their property. (*Am J Public Health*. Published online ahead of print July 19, 2012; e1–e6. doi:10.2105/AJPH.2012.300718)

SCHOOL BUSES, A PRACTICAL necessity for millions of children across the country, are increasingly at the center of controversial efforts to raise revenue for distressed public school districts. Commercialization of the school setting is not new,^{1,2} and school

buses have been the subject of contentious marketing strategies in the past.³ New school bus advertising bills and laws have brought commercialization concerns back to the forefront, and may have unwittingly exposed school districts to First Amendment lawsuits.

School bus advertising is intended to generate revenue for the state, usually for school-related needs.^{4,5} In states with enacted laws, revenues are reportedly modest.⁶ However, supporters believe any level of income is meaningful,⁶ and have called bus advertisers “local heroes” for investing in schools.⁷ Not all public officials and parents agree.⁶ Bills have been voted down over safety concerns and disagreement with the commercialization of the school setting.⁸

In addition to raising concerns about safety and commercial exploitation, such proposed state legislation may be unintentionally setting up school districts to be the target of First Amendment lawsuits.⁹ Public school buses are government property akin to public transportation and school campuses. When they have opened their facilities to advertisers, public transit authorities are regularly required to fend off First Amendment lawsuits,^{10–14} and

public school districts have faced similar legal challenges.^{15,16} School buses may represent the next frontier of litigation over permissible speech on government property. School districts generally want to maintain control over what can be displayed on the interior and exterior of school buses. Therefore, an understanding of First Amendment jurisprudence related to government property and of the applicable legal test, forum analysis, are essential.¹⁷

I examined various proposed and enacted school bus advertising bills and laws. I also reviewed First Amendment forum analysis as applied in the public transit and public school settings to clarify how this body of law may affect school districts subject to school bus advertising laws. I have made recommendations for school districts to enact appropriate policies to maintain control over their property and avoid litigation.

SCHOOL BUS ADVERTISING

School bus advertising bills and laws are being proposed and passed by states to permit local school boards to enter into contracts to sell or lease portions of school buses to advertisers. The

variability of proposals is informative.

The majority of state bills and laws (collectively, laws) permit advertising to be sold on the exterior of school buses only.^{18–25} These laws generally contain a prohibition for ads for political speech, tobacco, and alcohol,^{20,21,23} and some laws additionally exclude ads for gambling, drugs, or material of a sexual nature.^{19,22,24,25} New Mexico’s law permits advertising on both the bus’s interior and exterior, with all of these prohibitions.²⁶ Minnesota’s law additionally prohibits advertising that is discriminatory, false, misleading, deceptive, or relating to antisocial behavior.²⁷ Two bills that failed to pass prohibited religious speech.^{23,28} Currently, only New Hampshire and Michigan prohibit advertisements on the exterior of school buses.^{29,30} Conversely, a bill was introduced in Rhode Island to allow all advertising on the interior and exterior of school buses without constraint.³¹ Similarly, Washington’s open-ended bill leaves approval of proposed ads to the school district’s board of directors.³²

There are strong arguments that school property should not display any advertising.³³ New bills and laws evidence a rejection



of this position. From a legal standpoint, it may become problematic that emerging laws do not preclude religious speech and, from a public health standpoint, that most do not preclude advertising for products with public health implications, such as unhealthy food and beverages. Tennessee's statute is an exception to the latter.³⁴ The state's statute permits local school districts to sell "commercial advertising" on the exterior and interior of school buses but precludes the advertisement of "individual food items" that "cannot be sold or offered for sale to pupils in pre-kindergarten through grade eight (pre-K-8) through vending machines."³⁴

A 2011 Centers for Disease Control and Prevention (CDC) report found that nationally, 49% of all middle and high school districts allow advertising for unhealthy foods.³⁵ In light of the nation's childhood obesity epidemic, food marketing in the school environment has been criticized.³⁶ The Institute of Medicine concluded that "food advertising to children affects their preferences, purchase behaviors, and consumption habits for different food and beverage categories, as well as for different product brands."³⁷ The most recent data from a study by the Federal Trade Commission revealed that in schools, 90% of industry expenditures promoted sweetened beverages and most of the remaining 10% were dedicated to quick service restaurants.³⁸ This might be an indication of the type of food advertising that will be permitted on school buses if appropriate restrictions

are not instituted. The food industry's self-regulatory pledges restrict advertising in elementary schools, but with many exceptions.³⁹ The pledges do not apply to middle and high schools or to school buses for any grade level.^{39,40}

The last time that school buses were at the center of such a debate was in the context of "BusRadio." From 2004 to 2009, BusRadio broadcast music, programming, commercials, and public service announcements to over 1 million children aged 6 to 18 during their bus ride.⁴¹ The Federal Communications Commission conducted a study in 2009 to determine the nature of this service and whether it was appropriate for children and in the public interest.⁴¹ The commission found that BusRadio had potential benefits and harms.⁴¹ In concluding that school districts and parents should determine whether BusRadio is appropriate for their community, the

commission noted that the "overwhelming majority of commenters assert that the potential harms inflicted on children by BusRadio far outweigh the service's countervailing benefits."^{41(p24)}

BusRadio prohibited specific subject matter in its broadcasts, including assault and other violence, criminal acts, gang activity, guns and other weapons, disrespect, drugs, alcohol, smoking, swear words, racial, religious, and sexual slurs or other prejudice, sexual innuendo, and content that is political or partisan.⁴¹ In addition, the company vowed to screen the content of all advertisements to ensure that messages and subject matter were appropriate and expressly identified "commercials for unhealthy fast food" as inappropriate.^{41(Appendix A)} It is unclear to what extent these guidelines were followed because the company would not disclose its advertisers or its commercial content.⁴¹

A 2010 survey of 797 parents and 308 nonparent adults found that both groups supported restrictions in the school setting for unhealthy food advertising and promotion to children younger than 12 years old. This garnered more support than restrictions in any of the other 18 venues surveyed, including text messages, Internet advertising, television commercials, and "advergaming," or online games designed to market a particular brand (Yale University Rudd Center for Food Policy and Obesity and HAMIL Associates, unpublished data, 2010).

Definitions of terms used in this essay are given in the box below.

FORUM ANALYSIS

School buses, like public schools and public transportation, are government property. The First Amendment rights of potential advertisers and the authority

Definitions of Terms	
Term	Definition
First Amendment protection for speech	Congress shall make no law...abridging the freedom of speech.
Traditional public forum	Government property traditionally devoted to assembly and debate, such as public streets and parks.
Designated public forum	Government property that is not traditionally open to public discourse, but that the government intentionally opens up for such discourse.
Nonpublic forum	Government property the government has opened for limited discourse compatible with the nature of the forum.
Limited public forum	Term used inconsistently by different courts to indicate different types of government property. To avoid confusion, the term is not used in this essay.
Commercial speech	Speech that proposes a commercial transaction; advertising. False, deceptive, and misleading speech proposing a commercial transaction is not protected commercial speech under the First Amendment.
Government speech	The government's own speech. First Amendment constraints do not apply to government speech.



of the government to restrict advertising in such spaces is determined by the nature of the forum and the government's policy and practices related to the forum. Government property is divided among 3 types of forums: traditional public forum, designated public forum, and nonpublic forum.¹⁷ A traditional public forum includes property traditionally devoted to assembly and debate such as public streets and parks, and is not applicable to school buses.⁴²

A designated public forum is government property that is not traditionally open to public discourse, but that the government has opened for such speech.⁴³ Restrictions on speech in a designated public forum are analyzed under the strict scrutiny test, which means the government must prove that the restriction is narrowly tailored to serve a compelling government interest.⁴⁴ This is a difficult test to pass and often results in the government being required to allow more speech on its property than it may have originally intended. If a school bus is considered a designated public forum, even reasonable restrictions may be struck down by a court.

A nonpublic forum is property the government has opened for limited discourse compatible with the nature of the forum.⁴⁵ The government can restrict access to a nonpublic forum if the restrictions are "reasonable" and viewpoint neutral, which means they are "not an effort to suppress expression merely because public officials oppose the speaker's view."^{17(p678)} In a nonpublic

forum, the government may enact reasonable speech restrictions based on the subject matter of the speech, and courts will uphold these decisions.⁴⁵ School buses will be considered designated public or nonpublic forums, as determined by the authorities' policy and practice related to the buses.

LESSONS FROM SCHOOLS AND PUBLIC TRANSIT

The Supreme Court has proclaimed that the "government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."^{43(p802)} However, the government's intention is determined by both its policy and its practice of limiting or opening the property to speech.⁴³ School authorities that wish to limit the type of advertising permissible on school buses would need to create a nonpublic forum. Authorities would thus need to enact and enforce a policy to that end. They could incorporate school bus advertising restrictions within their wellness policy⁴⁶ or create a separate policy for the district.

When drafting guidelines, it would behoove school authorities to align the forum of the school bus with that of the school. Courts are more deferential to school boards than to transit authorities because of the unique nature of the school.⁴⁷ The Supreme Court recognizes that children are a captive audience when in school,⁴⁸ and also defers to school authorities to determine which speech is

appropriate for students.⁴⁹ This is based on the recognition that children may reasonably perceive speech within the school context to bear "the imprimatur of the school."^{49(p271)} A school district may exercise its authority to "preserve the property under its control for the use to which it is lawfully dedicated."^{45(p46)} The same rationale can be applied to school buses. School authorities would rely on the unique nature of the school bus in their plan to create and enforce an appropriate policy to protect children.

When government officials fail to enact and enforce a policy, they may inadvertently create a designated public forum. This more frequently occurs in the context of public transit and can serve as an illustration for school officials to avoid similar outcomes. Restrictions that would be permissible in the context of a nonpublic forum would be subject to strict scrutiny in a designated public forum.

In the transit context, courts have determined that the government unintentionally opened the forum to the public. This resulted from a transit authority enacting overly permissive policies,^{10,50} failing to enforce enacted policies,⁵¹ or leaving too much discretion to an employee to refuse or accept advertisements.^{11,52} The reservation of the right to reject ads does not create a nonpublic forum, and decisions based on this authority may not be upheld.¹¹ Even when a written policy exists, if government officials are vested with the authority to veto ads or arbitrarily or inconsistently apply the policy, a designated public forum may be found.¹²

Whether the government intended to create a designated public forum, it may unwittingly open the forum more than intended through inadequate policies or weak enforcement. Irrespective of its policies or intent, when a transit authority has accepted political advertising, courts have determined that the government opened the forum to the public.¹⁰ This is because political advertising is the crux of public discourse. Courts rationalize that an acceptance of political advertising indicates the government intended to accept speech on all topics, controversial or not, for its property. In such cases in the past, courts held that the transit authorities lost their ability to reject potentially misleading,¹¹ disparaging,¹⁰ and controversial political¹³ and religious speech,¹² in addition to commercial advertising for products the government deemed unfit for children (violent video games).¹⁴ By allowing political speech, the controlling authority was considered to demonstrate "a general intent to open a space for discourse," and thus, "a deliberate acceptance of the possibility of clashes of opinion and controversy."^{10(p130)} (A similar outcome has occurred in the public school context when school authorities opened facilities for group meetings, including political groups; courts have concluded that the school cannot exclude groups with controversial agendas, such as neo-Nazis.⁵³)

To avoid controversial advertising and successfully create a nonpublic forum, both transit and school authorities have maintained and enforced a policy of



disallowing political and religious speech.^{15,54} Permitting only commercial speech, or advertising, indicates that the government is acting in its position as a proprietor of the forum and that generating revenue is its primary goal.^{10,55} The foundation of a nonpublic forum is to not open the property for all speech, but rather to open the property for limited speech to make a profit off the forum.⁵⁶

If school officials confined bus advertisements to commercial speech, they could then institute reasonable restrictions to exclude subject matters deemed inappropriate for youths consistent with the nature of the forum. When schools have successfully created a nonpublic forum, courts have upheld their exclusion of ads for religion, controversial issues, tobacco, alcohol, pornography, birth control, gambling, and X- and R-rated movies.^{15,16} In other cases finding a nonpublic forum, courts have upheld restrictions on advertising of adult book stores, massage parlors, pawn shops, and tattoo parlors.⁵⁷ Thus, when a nonpublic forum is found, inappropriate ads and controversial speech may be restricted to account for the nature of the forum.

CREATING A NONPUBLIC FORUM FOR SCHOOL BUSES

Public health and child protection advocates advise against the commercialization of school property.³³ This advice should be strongly considered for school buses. If it is not accepted, school districts should consider enacting

and enforcing appropriate guidelines to protect children from advertising that undermines public health and simultaneously ensure that districts are able to maintain control over their property.

To create a nonpublic forum and maintain control, school authorities must enact a policy specifying the location on or in the bus where advertising is permitted. Authorities must additionally enact guidelines on permissible and impermissible advertising content with appropriate viewpoint-neutral subject matter restrictions. Such restrictions should be based on the recognition that the purpose of the property is to transport children to and from school. Finally, school districts must enforce the policy.

Location

The Supreme Court has found that children are a captive audience when in school,⁴⁸ and that passengers in public transportation are a captive audience in transit cars.⁵⁴ It would be difficult to argue that children are not similarly captive while in a school bus. Marketers use the same terminology.⁵⁸ For example, one school bus marketing company promotes interior advertising as providing “unparalleled value” to “target” children during the ride to school because they “may view an interior bus ad as many as 7 times in every 35 minute ride.”⁵⁹ On the basis of the history of BusRadio and recent survey evidence, public opinion seems to reject advertising in this context. School authorities may therefore decide to prohibit all advertising inside school buses. Absent this, restrictions based on

subject matter, discussed in the next section, should be considered.

The exterior of the bus reaches children and the greater community. One marketer surmised that exterior ads reach on average 75 000 people a day.⁶⁰ Many school bus advertising laws limit advertising to the exterior of the bus and additionally specify the location on the bus exterior where ads are permissible.^{19,22,34,61} In legal terms, these are considered “time, place, and manner” restrictions on the location of speech. Such restrictions are valid if they are justified without reference to the content of the regulated speech, serve a significant governmental interest, and leave open ample alternative channels for communication of the information.⁶² Valid time, place, and manner restrictions will be upheld for buses no matter which type of forum is ultimately created.^{63,64} Such restrictions often define where advertising is permitted by referencing permissible panels for placement, size of the ads, whether the ad may be color or black and white, and its distance from reflectors, lamps, wheel wells, and emergency exits.^{34,61}

Subject Matter

The school authority should expressly state that it seeks to maintain control over advertising on school buses to maintain the purpose for which they are intended: transporting children to and from school. The first way to ensure that the district is creating a nonpublic forum is to enact a policy that accepts only commercial advertising and expressly

excludes religious and political speech.^{26,55} In making this distinction, it is noteworthy that the school district can still allow government-sponsored public service announcements without violating the prohibition on political speech.^{56,65} For example, an Ohio school bus advertising bill would permit the school board to use advertising space for its own statements, which would be a form of government speech.²⁵ Government speech does not fall under the same First Amendment constraints as the advertising at issue.⁴²

When a nonpublic forum is created, the government can enact reasonable limitations on permissible subject matters in a viewpoint-neutral manner.¹⁷ This means that the government can exclude an entire class of subjects, but it cannot discriminate on the basis of viewpoints within the subject area.¹⁷ For example, a school newspaper had a policy of excluding speech on the topic of birth control. In determining that the newspaper was a nonpublic forum, the Ninth Circuit found the school was permitted to reject an advertisement for family planning and abortion services because the restriction was not based on the advertiser’s viewpoint, but rather on neutral policy.¹⁶ Conversely, the school would not have been permitted to accept only an anti-abortion advertisement and reject a prochoice advertisement, because that would be discriminating based on viewpoint.

In the context of public health nutrition, if school authorities seek to limit the advertisement of unhealthy food and beverages on



buses, initially they should seek to institute reasonable viewpoint-neutral restrictions applicable to all school facilities. Such restrictions could include forbidding the advertisement of all food and beverages, or of those not permitted to be sold in the school.⁶⁶ CDC data indicate that 51% of middle and high schools sell unhealthy competitive food and 64% offer sugary beverages.³⁵ The Healthy Hunger-Free Kids Act of 2010 authorized the US Department of Agriculture to revise the nutrition standards of competitive foods and those offered through the National School Lunch and Breakfast Programs.⁶⁷ If school districts opt to allow food and beverage advertising, they would support public health by both limiting the sale of unhealthy products and simultaneously restricting advertisement to only those foods that meet the school's nutrition standards. Such advertising policies should be applied to all school facilities, including buses.

When a nonpublic forum is created, subject matter limitations on school bus advertising must be reasonable in light of the purpose served by the forum.⁶⁸ The following are suggested viewpoint-neutral guidelines that would be considered reasonable on the basis of the nature of the school bus, where the primary audience is children.

- Allow only commercial speech⁵⁴ and government-sponsored public service announcements.⁴²
- Prohibit all religious and political speech (including all speech for or against a candidate,

- campaign, issue, or ballot initiative).⁵⁵
- Prohibit ads that promote illegal activity.¹³
- Prohibit ads with false, deceptive, or misleading commercial speech.⁶⁹
- Prohibit ads that demean or disparage individuals or groups (without reference to specific groups so as to cover all people).¹³
- Prohibit ads for alcohol, tobacco, weapons, firearms, casinos, X- and R-rated movies, adult-only venues, violent video games, and ads of a sexual nature.^{57,70}
- Prohibit ads for food and beverages, or, in the absence of this mandate, prohibit ads for food and beverages not permitted to be sold in the schools.⁶⁶

Even if it seems unnecessary to explicitly limit some of the speech listed here, such as false, deceptive, or misleading commercial speech, because this speech is not protected by the First Amendment, explicit guidelines can serve as a basis for school officials to reject questionable advertisements and also guide school officials who may not be clear on the law.

Enforcement

School districts must consistently enforce the policy they enact. When government officials fail to follow their own guidelines and accept ads that are not permitted according to the policy, courts may find that the government created a designated public forum. In this case, advertising restrictions would be subject to strict scrutiny. If lack of

enforcement or failure to enact a policy results in a determination that the government created a designated public forum, the good news is that a school district may subsequently close the forum.⁷¹ Courts support the government's "right to control its property, which includes the right to close a previously open forum."^{15(p970)}

CONCLUSIONS

Until the nation provides a comprehensive solution to address the pervasive problem of underfunded public schools, states and school districts will seek measures to raise revenue. However, such revenue-generating methods should not result in children being exposed to advertising that undermines public health or encourages unhealthy behaviors. School districts should be aware of the law related to government property so they can enact policies to prohibit advertising that is inappropriate for a school setting. By enacting and enforcing such policies, school officials can maintain control over the speech permitted on school property, including buses, to protect children while in their care. ■

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Human Participant Protection

No protocol approval was necessary because no human participant data were used.

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