

Off the Map: Extracurricular School Food

PUBLIC HEALTH ADVOCACY INSTITUTE

TOPICS: »LEGAL NOTES: OPEN CAMPUS LUNCH
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Legal Notes: Open Campus Lunch

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While the laws are specific to and vary by localities, these notes provide some general legal considerations and specific examples regarding “open” or “off” campus policies that allow high school students to go off campus to purchase and eat food during their lunch periods. These notes are meant to complement the *Off the Map: Extracurricular School Food* issue brief, *Open Campus Lunch*. There are multiple points of access to influence open campus lunch policy. Please use these legal notes and the accompanying issue brief with our former work, *Mapping School Food*,¹ particularly *Preparing for Change, Appendix: School Organization*, and the school food decision-makers sections.

Copies of the *Open Campus Lunch* issue brief, *Mapping School Food: A Policy Guide*, and other related materials are available on the Public Health Advocacy Institute website at: www.phaionline.org/schoolfood.

The issue brief, these legal notes, and other available resources will help inform the creation of Potter Boxes—a decision-making matrix—that provides a contextualizing framework and helps identify key legal access points to reaching policy goals regarding open campus lunch issues. For more on Potter Boxes, please review *Mapping School Food*.

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¹ Marlo R. Miura, Jason A. Smith & Jess Alderman, Pub. Health Advocacy Inst., *Mapping School Food: A Policy Guide* (2007), available at www.phaionline.org/mappingschoolfood.

»School Structure, Power, and Responsibility: From State Laws to High School Handbooks

Education is generally a state power which, in addition to being used to set up state education controls such as departments, boards, policies, standards, statutes, and regulations, can be assigned to local authorities.² Therefore, laws and policies can differ greatly from state-to-state and locality-to-locality. The state has the power to set education standards,³ the curriculum,⁴ or to take over school districts.⁵

For example, California explicitly addresses its open campus lunch policy at the state level, stating that the district school board may elect to “permit the pupils enrolled at any high school to leave the school grounds during the lunch period of such pupils.”⁶ If the board chooses to allow students to leave during lunch, the board must provide specifically worded notice to parents and guardians as set by the California Education Code. Colorado has a state statutory law that allows a student to go off campus during lunch if a parent or guardian submits such a request in writing.⁷

New York’s State Assembly has two bills pending related to open campus lunch policy. One in part amends New York’s education law and “directs school districts and boards of cooperative educational services to prohibit students from

² See VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY 21-22 (2003).

³ See *id.* at 61-62.

⁴ See *id.* at 27.

⁵ See *id.* at 60.

⁶ CAL. EDUC. CODE § 44808.5 (2008).

⁷ COLO. REV. STAT. § 22-32-120(3) (2008) (“Upon the written request from a parent or guardian of a school-age pupil enrolled in a school, such pupil shall not be required to participate in a food-service program or remain on the school premises during the lunch period.”).

leaving school property during the school day[.]”⁸ Another amends the education law to include “provisions prohibiting any student from leaving the school property in a motor vehicle, including a snowmobile and an all-terrain vehicle, during such student’s lunch period.”⁹ Both were referred to the Education Committee in January of 2009, and the committee’s chair is the sponsor of the first bill. School district boards may oppose such state-level law, believing campus lunch policies to be district matters.¹⁰

Other state laws, while not directly controlling open campus policy, can create access points for policy change. Mississippi at the state level enacted the “Mississippi Healthy Student Act.” This act commands the State Board of Education to create regulations by March 1, 2008, that “shall take into account the most recent and advanced scientific principles regarding good human health and fitness, and the effect of the regulations must be that the good health, well-being and fitness of Mississippi school children shall be advanced.”¹¹ To this end, the State Superintendent of Public Education must appoint an advisory committee consisting of state legislative members, key representatives in the school and food service system, a dietician, and a physician, among others.¹² In Mississippi, the advisory committee itself or its specific members are decision-makers to consider approaching. Under state code, the committee has the power to request “facilities, assistance, and data” from “any department, division, board, bureau, commission or agency of the state or of any political subdivision of the state[.]”¹³ Therefore the committee has the explicit power to request data and assistance from other departments. If an advocate faces obstacles in Mississippi like lack of data, that power could be an important consideration in whether to work with the advisory committee to change school food policy.

The act also has a provision that allows local school districts to set even stricter rules and regulations.¹⁴ This is a key provision and points to potentially better solutions at the district level, if an advocate seeks to strengthen existing state policy as applied to a community—or if what an advocate seeks to change would be more effectively accomplished at the local level. Other state laws can correspondingly direct an advocate to key decision-makers or entities: At the district and local level, Mississippi state law directs that the school board controls each school district and is made up of five members.¹⁵ Mississippi also charges each local school district’s board to create a local school health council in each school whose tasks include making student health policy recommendations,¹⁶ creating another point where school food policy can be influenced or changed.

Moving from the state level to the district level, examining district board¹⁷ policies can also indicate options where change can be effectuated. Like state law language, they can show the reasoning behind such policies and provide valuable insight to assist preparation in approaching the board itself. In California, the Stockton Unified School District has a detailed board policy on open/closed campus.¹⁸ It allows open campus privileges for eleventh and twelfth graders who meet certain academic and attendance thresholds and who have obtained parent or guardian permission. The policy states that open campus is a way to “improve and reward student academic achievement and attendance” for the upper grades.¹⁹ Therefore, someone seeking to change this particular open campus policy should incorporate these values into their Potter Box as a way to assess the best reasoning, arguments, and suggested solutions to bring to this particular board. The district board policy also indicates approaching a local school principal as a way to institute a closed campus policy:

The principal may revoke the open campus privilege to any or all students at any time for specific reasons. . . . The principal shall submit a report to the Superintendent or designee indicating the nature and scope of the

⁸ N.Y. St. Assem., Bill Summary–A01866, *available at* <http://assembly.state.ny.us/leg/?bn=A01866>. See also the proposed bill and its specific language, A. 1866, 2009–2010 Reg. Sess. (N.Y. 2009), *available at* <http://assembly.state.ny.us/leg/?bn=A01866&sh=t> (amending state education law to direct districts and boards to provide “provisions setting forth specific circumstances under which students are limited or prohibited from leaving school property during the school day including lunch and other free periods”).

⁹ A. 3735, 2009–2010 Reg. Sess. (N.Y. 2009), *available at* <http://assembly.state.ny.us/leg/?bn=A03735> (click “See Bill Text”) or <http://assembly.state.ny.us/leg/?bn=A03735&sh=t>.

¹⁰ See, e.g., Winnie Hu, *Fatal Accidents Erode Perk of Off-Campus Lunches*, N.Y. TIMES, May 6, 2008 (“The New York State School Boards Association is among the opponents of [state legislation to ban students from driving during school lunch], arguing that such matters should be decided by local districts.”).

¹¹ MISS. CODE ANN. § 37-13-137(1) (2008).

¹² MISS. CODE ANN. § 37-13-137(2) (2008).

¹³ *Id.*

¹⁴ MISS. CODE ANN. § 37-13-137(3) (2008) (“Local school districts may adopt rules and regulations that may be more stringent but not in conflict with those adopted by the State Board of Education under this section.”).

¹⁵ See MISS. CODE ANN. § 37-6-7 (2008).

¹⁶ See MISS. CODE ANN. § 37-13-134(8) (2008).

¹⁷ In Massachusetts, they are referred to as committees rather than boards, so an advocate should verify if there are similar variances in his or her area.

¹⁸ See Stockton Unified Sch. Dist., AR 5112.5 (approved Dec. 12, 2006), *available at* <http://www.stockton.k12.ca.us/bp-archive/OpenClosedCampusAR5112.pdf>.

¹⁹ *Id.*

problem leading to the revocation of the open campus privilege and a procedure for reviewing the problem.²⁰

This could be a permanent or temporary solution to close a specific school campus. It could also be used as an impetus to approach the school board itself, encouraging a change in its policy, since the closing will involve the superintendent and possibly the board itself.

This specific board policy more broadly indicates that if the principal decides to close campus due to healthy eating and student welfare concerns, then that decision could reverberate upward, supported by the mechanisms of existing school policy and structure. In general, opening a dialogue with the local principal can be valuable, since some principals have the power to suspend or permanently close campuses for lunch. They also can provide practical information and provide the names of other decision-makers to contact.

Before approaching a high school principal, an advocate may want to review whether the high school has a specific open or closed campus lunch policy, the restrictions or requirements involved, and any specific language that could inform his or her conversation with the principal. A high school's campus lunch policy can often be found in a handbook or manual for students and parents, which can be obtained by asking a high school administrator for a copy or sometimes from the school's website. There may also be accompanying forms for students and parents or guardians to sign.

Open Campus Lunch Tort Concerns

Litigation can be viewed as an enforcement or policy-changing mechanism in its own right. While this tool is not discussed here, legal liability should be considered with relation to off campus lunch. Liability concerns can affect open campus and all school policies, because these policies are often shaped by legal liability concerns or influenced by remedies ordered by successful litigation. Therefore, potential legal liability needs to be considered in formulating or changing any school policy.

During school hours, there is a reasonable duty to supervise students and protect them from foreseeable harm.²¹ There have been a variety of cases against a school district involving off-campus vehicular accidents, fights, shootings, and injuries sustained while off campus or

returning home from school. While courts are less likely to find such a duty when a student is off campus, there have been instances where a court found a school district liable for off campus injuries.

Corollary Closed Campus Tort Concerns:

When deciding whether to close a campus, it should be determined whether there are adequate resources to supervise the students during the lunch period.

In *Davis v. Marzo*, a New York court reasoned that school districts generally are not liable for student death or harm that happens off campus.²² It held that even though open campus lunch policies may allow students to be in danger of injury, such a policy does not sustain a liability claim.²³ In another New York case, a student was shot during the lunch hour outside of his junior high school building.²⁴ The court found that liability for failure to supervise was not sufficiently established as the proximate cause of the student's death.²⁵

Immunity claims are often raised as defenses in these cases. Tort immunity is usually given when a school district performs a "discretionary" (requiring judgment) act.²⁶ There is no immunity when performing a "ministerial" (day-to-day) function.²⁷ In various cases, the duty to supervise students has been categorized as either discretionary or ministerial; therefore there is no clear, comprehensive way to determine whether a court will find liability for a certain act or function.

California has specific liability laws regarding off campus lunch. The California Education Code states that, "Neither the school district nor any officer or employee thereof shall be liable for the conduct or safety of any pupil during such time as the pupil has left the school grounds pursuant to this section."²⁸ If an open campus policy is elected, then notice

²² *Davis v. Marzo*, 865 N.Y.S.2d 440 (N.Y. App. Div. 2008), available at <http://www.courts.state.ny.us/ad4/Court/Decisions/2008/10-03-08/PDF/1197.pdf>.

²³ *Id.* at 441-42.

²⁴ *Maness v. City of N.Y.*, 607 N.Y.S.2d 325 (N.Y. App. Div. 1994).

²⁵ *Id.* at 326.

²⁶ See DODD, *supra* note 2, at 216-17.

²⁷ See *id.* at 217-218.

²⁸ CAL. EDUC. CODE § 44808.5 (2008).

See also CAL. EDUC. CODE § 44808 (2008) ("Liability when pupils not on school property"). Section 44808 states, in part:

Notwithstanding any other provision of this code, no school district, city or county board of education, county superintendent of schools, or any officer or employee of such district or board shall be

²⁰ *Id.*

²¹ See DODD, *supra* note 2, at 232-33.

must be given to the students' parents and guardians, and the notice must contain the above quoted language.²⁹

Many high schools require parent and guardian consent forms to be signed in order for a student to be allowed to go off campus for lunch. Liability waivers where the parents and guardians agree not to hold the district or school liable for any injuries are common. Some forms even require proof of automobile insurance and parents and/or guardians to sign it in the high school's office or have their signatures notarized.

↳ Enforcement Issues and Possible Enforcement Mechanisms

Lack of enforcement of school food policy hinders effective results. This section examines the federal No Child Left Behind statute as a model in order to discuss potentially effective mechanisms to build into open campus lunch policy, rules, and laws. However, a direct translation of the No Child Left Behind components to school food policy is not recommended; careful thought and tailoring towards the school food environment are necessary.

Enforcement of open and closed campus lunch policies can be a considerable problem.³⁰ One high school in Oregon had a written closed campus policy but lack of enforcement meant it was an open campus in practice.³¹ Student car accidents and "offensive behavior" in the local area prompted concern in the high school administration and in the community. The high school decided to revise its closed campus policy to being closed for driving but open for

walking off campus.³² The current student handbook states that there is a "closed campus policy for all students. No student is to leave campus during the day . . ."³³ Yet within the same provision, "[s]tudents who meet the following criteria may apply, with parent permission, for an off-campus lunch release pass."³⁴ This example is illustrative of several issues—including difficulty of enforcement leading to complete reversal of a written policy in practice—and how even though the policy is written and characterized as "closed," it is for all intents "open" both confusingly on paper and in practice.

On Paper: This policy is self-conflicting. Need to create specific definitions and language must be clear.

In Practice: Not even enforced.

Outcome: Need comprehensive overhaul of both written policy and implementation/enforcement.

↳ No Child Left Behind Enforcement Mechanisms

Title I of the Elementary and Secondary Education Act of 1965³⁵ is a federal law that has been reauthorized numerous times and is currently called the No Child Left Behind Act of 2001 (NCLB).³⁶ It provides the most federal funds for education and therefore considerably influences school policies.³⁷ The current version of Title I, NCLB, has evolved

responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when such pupil is not on school property, unless such district, board, or person has undertaken to provide transportation for such pupil to and from the school premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances.

Id.

²⁹ CAL. EDUC. CODE § 44808.5 (2008).

³⁰ See also the *Lack of Enforcement and Leadership* section in the accompanying issue brief. Marlo R. Miura, Pub. Health Advocacy Instit., *Off the Map: Extracurricular School Food: Open Campus Lunch* (February 2009), available at www.phaiononline.org/schoolfood.

³¹ Evan Jensen, *Foot Traffic Only for EHS Lunch Period*, THE ESTACADA NEWS, June 18, 2008 (quoting the vice principal, "We originally did a real good job at closing the gate out front. But pretty soon, we found out that students were parking over by the cemetery. We even had some who would jump out of their cars and move the heavy gate out front. Over the last year and a half, we have slowly backed off on trying to have a mote [sic] or drawbridge out front.").

³² See *id.* ("We've been interested in developing a policy we could actually try to enforce.").

³³ Estancia High School, Student Handbook, http://www.esd108.org/highschool/school_handbook.asp (last visited Feb. 10, 2008).

³⁴ *Id.*

³⁵ Elementary and Secondary Education Act of 1965, Title I, Pub. L. No. 89-10, § 201, 79 Stat. 27 (1965).

³⁶ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002). The Secretary of the Department of Education recently amended regulations pertaining to NCLB, to be effective November 28, 2008. See Title I—Improving the Academic Achievement of the Disadvantaged; Final Rule, 73 Fed. Reg. 64435, 64436 (Oct. 29, 2008) (to be codified at 34 C.F.R. pt. 200), available at <http://www.ed.gov/legislation/FedRegister/finrule/2008-4/102908a.html> ("The Secretary amends the regulations governing programs administered under Part A of Title I of the Elementary and Secondary Education Act of 1965, as amended, to clarify and strengthen current Title I regulations in the areas of assessment, accountability, public school choice, and supplemental educational services.").

³⁷ See Emily Susfki, *Actually, We are Leaving the Children Behind: How Changes to Title I Under the No Child Left Behind Act Have Helped Relieve Public Schools of the Responsibility for Taking Care of Disadvantaged Students' Needs*, 14 GEO. J. ON POVERTY L. & POL'Y 255, 268 n.65 (2007); Sarah D. Greenberger, Comment, *Enforceable Rights, No Child Left Behind, and Political Patriotism: A Case for Open-Minded Section 1983 Jurisprudence*, 153 U. PA. L. REV. 1011, 1016

into a law that focuses on improving the academic proficiency of all students as assessed by state standards and testing.³⁸ While there is justified, strong criticism about NCLB and its requirements, it does have certain successful compliance rates that demonstrate the effectiveness of the act's compliance and enforcement mechanisms.³⁹ Within five years of NCLB, all states had accountability plans in place.⁴⁰

A direct or wholesale application of NCLB provisions and enforcement mechanisms towards open campus lunch policies and other school food environment policies is not suggested. However, these provisions and mechanisms are instructive towards what types of considerations should be evaluated in designing an effective lunchtime or school food policy.

“We have a concrete wellness policy which most schools follow for all school sponsored events, but it is not enforced. Therefore, some schools choose to disregard requirements, going for what sells!”

—Food Service Director, Massachusetts

NCLB demonstrates the importance of clear standards and the ability to assess those standards through measures like required data collection and specific reporting requirements. While NCLB outlines general requirements, each state must tailor and set its own standards and create an accountability plan that measures “adequate yearly progress” (AYP) by setting time frames, intermediate goals,

(2005); and Peter Zamora, Note, *In Recognition of the Special Needs of Low-Income Families?: Ideological Discord and Its Effects upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001*, 10 GEO. J. ON POVERTY L. & POL'Y 413, 415 (2003) (citing Heritage Statistics).

³⁸ The statute states: “The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.” 20 U.S.C. § 6301 (2002) (“Statement of purpose”).

³⁹ However, long term compliance has proven difficult or impossible for some states. Annual Yearly Progress requirements and issues of implementation continue to be criticized and debated. See, e.g., Edward W. Wiley, William J. Mathis & David R. Garcia, *The Great Lakes Ctr. for Educ. Research and Practice, The Impact of the Adequate Yearly Progress Requirement of the Federal “No Child Left Behind” Act on Schools in the Great Lakes Region* (2005).

⁴⁰ See U.S. Dep’t of Educ., *No Child Left Behind’s 5th Anniversary: Keeping Promises and Achieving Results* (Jan. 2007), <http://www.ed.gov/nclb/overview/importance/nclb5anniversary.pdf> (last visited Feb. 10, 2009).

objectives, assessments, sanctions, and rewards.⁴¹ As part of this, the state publishes a student academic performance report card every year with both aggregated and disaggregated data and analysis of the data, such as cross-comparisons of certain groups of students.⁴² These data collection and reporting requirements are crucial in evaluating student performance, and disaggregated data can pinpoint underperforming groups of students that could be underserved and otherwise ignored.⁴³

States have considerable incentive to meet NCLB requirements, because federal funding could be withheld if a state fails to meet them or if it fails to meet them within their deadlines.⁴⁴ Since school food-related policies can be underfunded, using funds as an enforcement incentive is often not an option. Perhaps alternate or supplemental funding can be obtained from a complementary source and used towards enforcing closed campus and school food policies.

Prolonged failure to meet adequate yearly progress results in escalating consequences for a school, e.g., allowing students to transfer out of the school, providing certain technical and supplemental educational services, replacing staff or curriculum, and restructuring the entire school’s administration.⁴⁵ These real consequences have a concrete and financial impact. There is a cost involved with exacting all the penalties for failure to meet AYP, for instance providing for additional educational services. Also, the local education agency must either provide or pay for transportation costs for the transferring students⁴⁶ and cope with the consequences of having fewer students. In addition to the monetary and

⁴¹ 20 U.S.C. § 6311(b)(2-4) (2002).

⁴² 20 U.S.C. § 6311(h)(1)(C) (2002). Assessment must be “disaggregated by race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged” 20 U.S.C. § 6311(h)(1)(C)(i) (2002).

⁴³ Cf. *The Comm’n on No Child Left Behind, Beyond NCLB: Fulfilling the Promise to Our Nation’s Children 75* (2007) (“We also recommend requiring schools to disaggregate graduation-rate data, as well as the elementary school indicator, and use this disaggregated data and indicator in AYP calculations. Disaggregation will help ensure that schools do not mask problems by reporting averages; instead they will be held accountable for all students.”).

⁴⁴ 20 U.S.C. § 6311(g)(2) (2002) (“Failure to meet requirements enacted in 2001. If a State fails to meet any of the requirements of this section . . . then the Secretary [of the Department of Education] may withhold funds for the State administration under this part [Title I] . . . until the Secretary determines that the State has fulfilled those requirements.”); and 20 U.S.C. § 6311(g)(1)(A) (2002) (stating under *Penalties* that for states that fail to meet certain deadlines, “the Secretary shall withhold 25 percent of funds that would otherwise be available”).

⁴⁵ 20 U.S.C. § 6316(b)(1, 5, 7-8) (2002).

⁴⁶ 20 U.S.C. § 6316(9) (2002).

implementation burdens, there is the threat of job loss to the school staff, including the principal, and of having control of the school ceded to the state or an outside entity.

A major criticism of NCLB has been that it is underfunded, forcing schools to spend non-federal funds in order to come into compliance with NCLB. For a law like NCLB to be effective, adequate funding is necessary. Otherwise, mechanisms like monitoring and reporting are not possible, and enforcement becomes difficult or impossible.

General NCLB lessons to consider when crafting policy:

- » Clear standards and rules
- » Reporting obligations, monitoring provisions, data collection
- » Evaluation based on reporting and standards/rules
- » Enforcement “motivators”—incentives, sanctions, accountability mechanisms, holding certain people or agencies responsible
- » Adequate funding—where does the money come from and is it enough for implementation, monitoring, evaluation, and enforcement

Legal Interventions—Holistic Considerations

There are often important considerations that affect the translation of legal interventions and laws to effective public health outcomes, specifically, enforcement mechanisms and community policies and support.⁴⁷ Some of these considerations can be found in these notes and the accompanying issue brief on open campus lunch policies. Examining laws, rules, and policies implemented to achieve that goal can: affect behavior and outcomes; craft better laws, rules, and policies; and indicate what combinations are most effective. For example, if an advocate's goal is to close a high school campus for lunch or during the entire school day, does closing the campus achieve the desired result? Should the school conduct surveys, interviews, and an investigation to understand how the school food environment currently functions and pinpoint foreseeable problems with policy

⁴⁷ See Anthony D. Moutlon, Shawna L. Mercer, Tanja Popovic, Peter A. Briss, Richard A. Goodman, Melisa L. Thombly, Robert A. Hahn & Daniel M. Fox, *The Scientific Basis for Law as a Public Health Tool*, 99 AM. J. PUB. HEALTH 17, 19, 23 (2009).

changes? Are there complementary solutions like implementing a staggered lunch system?

If there is an attempt to improve the school food environment through changing open campus lunch policies, then there must be healthy food options on the closed campus; adequate resources to feed all those who purchase food within the lunch period; student support and feedback; and enforcement mechanisms, rules and complementary legal mechanisms in place to support the overarching goal.

A January 2009 article surveying systematic reviews of public health laws concluded that most interventional health laws do improve public health, and it identified the specific laws evaluated.⁴⁸ Nevertheless, it also found areas that needed to be addressed, e.g., examining and evaluating the “mechanisms” by which the laws function, as well as the need for enforcement to be built into those mechanisms.⁴⁹

Consider working in conjunction with community leaders outside of school issues to make a coherent effort to change an array of public health laws. The sum of your labors may have the greatest impact. Los Angeles recently passed an ordinance banning new fast food restaurants from opening in areas of South Los Angeles for one year. These areas have large Latino and Black communities, low income neighborhoods, and a high prevalence of obesity and diabetes.⁵⁰ Ordinance number 180103, unanimously passed by the LA City Council and signed by the acting mayor, became effective September 14, 2008.⁵¹ City Councilwoman Jan Perry proposed the ordinance because of littering and because “the profuse over concentration of fast-food businesses in low-income areas . . . intensifies socio-economic problems in the neighborhoods, and creates serious public health problems through poor nutrition for children, magnets for juvenile delinquency, and a proportionally much higher cost for food.”⁵² The ordinance is a stop-gap measure to give

⁴⁸ See *id.* at 20-22, 23.

⁴⁹ See *id.* at 23.

⁵⁰ Tami Abdollah, *A Strict Order for Fast Food*, LOS ANGELES TIMES, Sept. 10, 2007.

⁵¹ Los Angeles, Cal., Ordinance No. 180103 (Aug. 4, 2008) (effective Sept. 14, 2008) (entitling it “Imposing interim regulations on the issuance of all permits related to the establishment of new fast food restaurants on commercial or industrial zoned properties located on streets designated as major Highway Class I, Major Highway Class II and Secondary Highway in the West Adams-Baldwin Hills-Leimert Community Plan Area & portions of the South Los Angeles and Southeast Los Angeles Community Plan Areas—CPC 2007-3827-ICO”), available at http://clkrep.lacity.org/onlinedocs/2007/07-1658_ord_180103.pdf.

⁵² Motion by Jan Perry, Councilwoman 9th District, Council of the City of Los Angeles, May 25, 2007, available at http://clkrep.lacity.org/onlinedocs/2007/07-1658_mot_5-25-07.pdf.

the city time to assess how to proceed with their concerns about the proliferation of fast food restaurants and issues of health, obesity, and improving the local food environment.⁵³ Advocates working to close high school campuses could use this opportunity, which shows support from the city council and mayor's office, to improve the built environment around schools and strengthen support for better school food policies.

Legal and policy interventions to improve the school food environment must be comprehensively analyzed and integrated into order for them to be translated into positive effects. One law professor cautioned that eliminating fast food vendors from high school cafeterias may trigger open campus lunch policies to supplement the gap created in food service resources.⁵⁴ The reverse could also be true. Thus, a strategy to improve healthy food choices may result in both less regulation of what students eat over lunch and even poorer eating choices being made available. A state legislative representative pointed out that, in Hawaii, funds from tobacco lawsuit settlements have been used to promote healthier living in schools and the community as an example of successful comprehensive legal approaches and how the tobacco settlement funds were used to improve various aspects of public health.⁵⁵

Next Steps

In order to craft effective school food policy, it is important to integrate legal considerations, like the issues in these legal notes, with concerns and factors specific to a policy—here open and closed campus policy—and the realities of a particular community and situation. An advocate should craft a Potter Box based on these legal notes, the corresponding open campus issue brief, *Mapping School Food*, and other specific information and laws that can be gathered. The advocate can then match up what is discovered through the Potter Box with reasonable legal approaches to achieve the advocate's policy goals. Including meaningful enforcement measures in the policy will make it more effective.



See also, City of Los Angeles Envtl. Affairs Dep't, *City of LA Interim Ordinance Bans New Fast Food Restaurants in Two Council Districts*, 18(8) AN ENVTL. AFFAIR 3 (Aug. 2007) ("The City follows other municipalities in their efforts to reduce the proliferation of food package littering, the establishment of fast food restaurants in many low-income areas where food security is an issue, and the problem of childhood obesity.")

⁵³ See, e.g., Molly Hennessy-Fiske, *Panel OKs One-Year Ban on New Fast-Food Restaurants in South L.A.*, LOS ANGELES TIMES, July 23, 2008; and Kim Severson, *Los Angeles Stages a Fast Food Intervention*, NEW YORK TIMES, Aug. 13, 2008.

⁵⁴ Edward P. Richards, Maile S.L. Shimabukuro, Susan Combs & Marshall W. Kreuter, *Innovative Legal Tools to Prevent Obesity*, 32 J.L. MED. & ETHICS 59, 60 (2004) ("More generally, all proposed strategies must be carefully analyzed to identify possible unintended consequences.")

⁵⁵ *Id.*

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Off the Map: Extracurricular School Food

PUBLIC HEALTH ADVOCACY INSTITUTE

LEGAL NOTES: SCHOOL STORES, CONCESSIONS, AND FUNDRAISING

BY JASON A. SMITH, MTS, JD *

Traditionally, education is the province of state and local governments.¹ Legal authority to regulate foods in concessions, fundraisers, and school stores rests primarily at the state and local levels. Yet, the exact legal authorities will likely involve a complex mix of state and local laws that vary significantly from state to state.² Practitioners should spend time identifying the legal authorities and practices both in their state and in their municipality.

The board of education has the authority to regulate schools for the purpose of protecting the health of pupils except as where it may be limited by local boards of health. The regulation of unhealthy foods on school grounds and at events where students are present would likely fall under such authority.³ The board of health may also be used to regulate unhealthy food in schools.⁴ However, the interactions between boards of health, local school boards, and state boards of education will be exceedingly complex and requires a detailed analysis of state law.

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¹ VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY 21 (2003). See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

² DODD, *supra* note 1, at 22-32 (“State Control over Local School Boards”).

³ See, e.g., *Streich v. Board of Educ. of Indep. School Dist. of City of Aberdeen*, 34 S.D. 169 (1914); 68 Am. Jur. 2d *Schools* § 311 (2008); and 78A C.J.S. *Schools and School Districts* § 1004 (2008).

⁴ See generally, *Winnebago County v. Davis*, 156 Ill.App.3d 535 (Ill. App. 2d Dist. 1987); 93 A.L.R. 1413 (2008); and 78A C.J.S. *Schools and School Districts* § 1007 (2008).

Local school administrations can be particularly sensitive to local political and social pressures, making changes to the school food environment or the improvement of wellness policy enforcement a matter of community organizing in conjunction with purely legal solutions.⁵ Practitioners should note that the key to improving food found in these areas is building community support and offering alternatives. Because of the variability of enforcement mechanisms and politics, it may be better to seek a state solution.⁶ However, practitioners should note potential difficulties that might arise under doctrines of preemption and ensure that state solutions are crafted to secure both enforcement and sufficient flexibility to meet the demands of responding to public health concerns.



⁵ See, e.g., *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 290ff (W.Va. 1998); and Elaine Jones, *Luck Was Not a Factor: The Importance of a Strategic Approach to Civil Rights Litigation*, 11 ASIAN L.J. 290 (2004).

⁶ See, e.g., University of Arkansas for Medical Sciences Fay W. Boozman College of Public Health, Year Four Evaluation: Arkansas Act 1220 of 2003 to Combat Childhood Obesity (April 2008).

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