



Advertising in Public Schools

Published online in [TASB School Law eSource](#)

Given the reduction in state funds available for public schools, school districts in Texas increasingly rely on local fundraising to support not only special programs but also basic operational needs of public school districts. Advertising has become a particularly attractive method of fundraising for schools as a result of both the need for more diverse sources of funding and the proliferation of media available to send a commercial message to students, parents and the district community. This outline discusses the legal and policy issues presented by various types of advertising agreements that Texas districts may consider.

I. Advertising agreements

Advertising can take many forms, including: direct advertising in exchange for money; in-kind advertising in exchange for goods or services; or negotiated donation of funds or property in exchange for sponsorship recognition. The outlets for advertising in schools are also numerous: advertising can be placed on permanent, material objects (like school buses, textbook covers, yearbooks, uniforms, or scoreboards); or it can be conceptual (naming rights, sponsorship agreements) or temporary (athletic event announcements, school radio or television, or the district website). All of these arrangements have one thing in common—they are all the subject of an agreement, or contract, between the school district and another entity.

A. Authority

As with any agreement binding the district, districts must ensure that a representative of the district with appropriate authority reviews and signs the contract on behalf of the district. Depending on the nature or value of the contract and local policy, the board of trustees may need to take action to approve the contract. School officials should consider that some parents and community members feel strongly about keeping ads that promote commercial products out of public education; thus, a decision to engage in a district-wide advertising program may be controversial. In order to address such community concerns, a board may decide to take action on an advertising contract in an open meeting even if board approval is not strictly required.

B. Exclusivity

The district's attorney should also review advertising contracts to ensure that the district is getting a good deal on favorable terms that comply with relevant laws and local policy. Some agreements may include restrictions on the district's ability to engage in other types of fundraising (e.g., sale or advertising of other similar products). These restrictions should be as limited as possible and must be clearly and specifically explained in the agreement. In addition, the district should review its records prior to agreeing to a contract with exclusivity terms in case the proposed terms would violate a previous contract.

C. Procurement

Texas Education Code chapter 44 requires districts to competitively procure any contract for the purchase of goods or services valued at \$50,000 or more in the aggregate for a 12-month period using one of the methods listed in the statutes. Tex. Educ. Code § 44.031(a). At first glance, advertising agreements may not appear to require competitive procurement under Chapter 44. In most situations, even when a district receives items in exchange for a vendor's right to advertise on district property, the district itself is not purchasing the items directly. Even so, the district may wish to competitively procure the contract by, for example, issuing a request for proposals (RFP). Particularly with regard to high profile and high dollar sources of revenue, an RFP may demonstrate an effort to get the best value for the district even if not strictly required by law.

II. Advertising content

A. First Amendment

As governmental entities, school districts must comply with the First Amendment of the U.S. Constitution. The Free Speech Clause of the First Amendment restricts government regulation of certain speech. In the context of advertising, this means that a school district may not abridge an advertiser's freedom of speech when regulating advertising on district property. This does not mean, however, that a district must permit any and all requests for advertising.

Government Speech. When determining whether advertising is protected by the First Amendment, the first question to answer is what type of speech the advertisement is characterized as. The Free Speech Clause of the First Amendment restricts government regulation of private speech; it does not regulate government speech. When the government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. Government statements and actions

that take the form of speech do not create a forum for private speech. The government does not unconstitutionally discriminate on the basis of viewpoint when it chooses to advance permissible goals, even if advancing those goals necessarily discourages alternative goals. The government may exercise its freedom to express its views, even when it receives assistance from private sources for the purpose of delivering a government-controlled message. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) (Texas specialty license plate designs were government speech, thus state did not violate nonprofit organization's free speech rights by denying its application for design with Confederate flag.) The U.S. Supreme Court has used three-factors to analyze whether particular speech is government speech: history, endorsement, and control. That is, what is the history of the speech at issue; would a reasonable observer conclude that the government has endorsed the message; and has the government exercised control over the message? These factors taken together can establish that certain advertisements are government speech rather than private speech. *See Mech v. Sch. Bd. of Palm Beach County, Fla.*, 806 F.3d 1070 (11th Cir. 2015) (School district did not violate business owner's free speech rights by removing sponsorship banners from school property because school endorsed the banners and exercised substantial control over messages conveyed by banners).

Commercial Speech. If the advertisement is not government speech, the U.S. Supreme Court recognizes that different types of private speech are given different levels of protection. For example, rules that restrict core political speech must pass strict scrutiny—the highest level of judicial review. Advertising is generally considered *commercial speech*, which receives less protection than other types of speech. A school district can regulate commercial speech, like advertising, as long as: (1) the commercial speech is not misleading or unlawful; (2) the district has a substantial governmental interest in regulating the speech; (3) the regulation directly advances the district's governmental interest; and (4) the scope of the regulation is reasonable given the interest being served. *See Board of Trs. of the State Univ. of New York v. Fox*, 492 U.S. 469 (1989) (clarifying commercial speech analysis in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980)).

Limited Public Forum. Additionally, a court reviewing a district's regulation of advertising must also consider the setting, or *forum*, of the advertisement. Three types of forums are traditionally recognized under the First Amendment: (1) traditional public forums; (2) limited or designated public forums; and (3) nonpublic forums. Generally speaking, school campuses are considered nonpublic forums. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). When a district enters into an advertising agreement, the district may want to clarify this point in policy or the agreement to preserve the nonpublic nature of the forum. Otherwise, the district risks inadvertently creating a more open forum in which efforts to apply policy or

criteria to speech, even commercial speech, could be subject to a higher level of scrutiny. *See, e.g., Demmon v. Loudoun County Pub. Schs.*, 342 F. Supp. 2d 474 (E.D. Va. 2004) (rejecting school's argument that it did not intend to create a public forum when selling bricks for a school walkway and encouraging purchasers to express their feelings in brick inscriptions as fundraising project).

Viewpoint Discrimination. Regardless of the forum, the First Amendment also prohibits *viewpoint discrimination*. In other words, if district policy allows advertising on a certain subject matter, then it must accept all viewpoints on that subject. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (holding that governmental entity may regulate content of speech in nonpublic forum as long as restrictions are reasonable and viewpoint-neutral). As long as the district's reasons for declining a specific advertisement are reasonable and viewpoint-neutral, courts have upheld districts' refusal to sell advertising space to religious or controversial organizations. *See DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) (upholding refusal of advertisement containing text of Ten Commandments based on concerns regarding disruption and controversy). *See also Planned Parenthood, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (en banc) (concluding that school newspaper did not open a public forum by selling advertising space merely to fund the project, and school's reason for declining an ad from Planned Parenthood about birth control was reasonable and viewpoint neutral).

For example, the Fifth Circuit Court of Appeals upheld Lubbock ISD's ability to deny advertising space to a private company that sought to display an image of a tattooed Jesus and the website "www.jesustattoo.org" on the district's jumbotron. *Little Pencil, LLC v. Lubbock Indep. Sch. Dist.*, 616 F. App'x 180 (5th Cir. 2015). Lubbock ISD rejected the proposed advertisement, in part because employees and students were not permitted to display tattoos at school. The company sued the district, alleging unconstitutional viewpoint discrimination based on the religious message conveyed in the advertisement. The court found that the jumbotron was a limited public forum, based on the purpose of the forum as expressed in the district's policy GKB(LOCAL), a TASB recommended policy, which stated that advertising was accepted "solely for the basis of covering the costs of providing materials and equipment, *not for the purpose of establishing a forum of communication.*" The court found the district's denial of the Jesus tattoo advertisement was reasonable in light of district policy and the purpose of the forum.

B. District policy

District policy should define advertising narrowly in order to make it clear that the district does not intend to create a public forum, as discussed above. In addition, a good advertising policy should specify that the district may reject advertising that is inconsistent with federal or state law, board policy, district or campus regulations, or

curriculum, as well as any content which the district determines has a reasonable likelihood of exposing the district to controversy, litigation, or disruption. A district considering an advertising program as a source of revenue should contact its TASB policy consultant to ensure that the district's policy GKB(LOCAL) contains these elements.

III. Specific forms of advertising

A. Outdoor advertising

Districts considering advertising with signs near roads and highways should be aware that outdoor advertising is strictly regulated in the Texas Transportation Code. Tex. Transp. Code chs. 391-395; 43 Tex. Admin. Code ch. 21, subch. I. The law restricts certain signs on rural roads and rights-of-way and regulates the erection and maintenance of commercial signs near highways in compliance with the federal Highway Beautification Act of 1965. A sign is broadly defined as any structure, display, light, device, figure, painting, drawing, message, plaque, placard, poster, billboard, logo, or symbol that is designed, intended, or used to advertise or inform. Tex. Transp. Code § 391.001(11-a). A *commercial* sign is one that is leased, or for which any type of payment is received, for the display of any good, service, brand, slogan, message, product, or company Tex. Transp. Code § 391.001(1-a). Willful violation of Texas Transportation Commission rules can result in criminal and civil penalties; in some cases, a fine of \$500 to \$1,000 may be assessed per day that the illegal sign is displayed. Tex. Transp. Code §§ 391.031, .061.

TASB Policies GKB(LEGAL) and GKB(LOCAL) contain further guidelines for outdoor advertising.

B. School bus advertising

Exterior advertising on school buses is permitted in Texas but strictly regulated by Texas Department of Public Safety rules, which establish where ads can be posted, how much of the school bus can be covered by ads, and the material that can be used to make the ads. In addition, districts that display advertising on school buses are subject to certain reporting requirements. 37 Tex. Admin. Code §§ 14.61 *et seq.* The standards for school bus advertising are located in your policy manual at TASB Policy CNB(LEGAL).

C. Naming rights, corporate sponsorships and scoreboards

In a naming rights agreement, the district agrees to name a district facility after an entity or individual (typically, a corporate sponsor) in exchange for money, goods, or some other benefit. Scoreboard agreements are another high profile funding opportunity in which a district may receive a scoreboard for its athletic facility in

exchange for the provider's right to sell and display advertising on the scoreboard. These arrangements are essentially a form of advertising agreement; as such, all the issues discussed above apply. In addition, naming rights, corporate sponsorships and scoreboard deals raise some unique concerns.

1. Title IX

Funds or materials received through a naming rights, corporate sponsorship or scoreboard agreement can impact a district's compliance with Title IX, the federal law prohibiting gender discrimination in district programs. 20 U.S.C. §§ 1681 *et seq.* One of the many factors considered in determining compliance with Title IX is the funding level of related programs. 34 C.F.R. § 106.41(c). *See also Favia v. Indiana Univ. of Penn.*, 7 F.3d 332 (3d Cir. 1993) (holding that expenditures are one factor in deciding whether the requisite equal opportunity was available). Once a district receives private funding the funds are public money and may not be used in a disproportionate manner that favors one gender. *Chalenor v. University of North Dakota*, 291 F.3d 1042 (8th Cir. 2002). Districts should include donated resources, including equipment or signage, in assessing whether both male and female athletic participation is supported fairly.

2. Bond issues

Districts that seek to sell the naming rights to a structure that was financed by state and local bonds should consult with the district's bond counsel regarding the potential consequences. The Internal Revenue Service (IRS) has determined that selling naming rights may cause state or local bonds to become taxable as "private activity bonds." I.R.S., Priv. Ltr. Rul. 200323006 (June 6, 2003). More specifically, under the "private use business test," if more than 10 percent of the bond proceeds are used for a nongovernmental purpose, the bonds qualify as taxable private activity bonds. 26 U.S.C. § 141. Applying this test, the IRS compares the fair market value of the cost of construction of the facility with the fair market value of the naming rights, and if the cost of the naming rights exceeds 10 percent the interest on the bonds could be treated as taxable. Districts should keep this in mind before agreeing to a sale of naming rights that could impact the ability of the bonds to provide tax-free interest to investors.

3. Public perception

As with other forms of advertising, a board's decision to name a facility after a private entity or accept a corporate sponsorship may result in controversy. Parents and other concerned citizens argue that students are particularly susceptible to corporate messaging. School officials should be prepared to face objections and explain to the public how the relationship will serve the educational mission of the district. Districts planning a corporate sponsorship

initiative should ensure that local policy and viewpoint-neutral regulations allow the district to refuse entities that contradict the district's mission or policies. For example, no school board wants to explain to its community why the district had to acknowledge the Ku Klux Klan as a corporate sponsor. *See, e.g., Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000) (holding Missouri's denial of the KKK to be included in state adopt-a-highway program amounted to unconstitutional infringement on KKK's right to free speech). In order to avoid less desirable corporate sponsors, a district may consider adopting local policy governing when a district will accept or refuse donations in addition to addressing advertising in GKB(LOCAL) as described above. See TASB Model Policy CDC(LOCAL).

Boards should also remember the example of Houston's former Enron Field. Selling the naming rights to a permanent facility inevitably means associating the district with the reputation of an entity outside the board's control. It is important to think about the long-term impact of such an agreement.

Conclusion

Advertising is a powerful fundraising tool, but like most powerful tools, it involves some risk. Districts looking to increase their revenue through an advertising program are wise to consider consulting with an attorney on the potential legal ramifications, particularly if the deal involves binding the district to specific terms and obligations. School officials should also engage with community stakeholders early in the process of embarking on any major advertising agreement and be prepared to respond to criticism. Finally, districts should adopt legally defensible policies and administrative guidelines that define the district's objectives and the lines of authority for approval of advertising agreements and content. With these controls in place, districts will be in a good position to benefit from the power of advertising.

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Community/documents/advertising_in_public_schs.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoolawesource.tasb.org.

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Updated January 2018