

State Laws on School Vending: The Need for a Public Health Approach

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I. INTRODUCTION

School nutrition has taken center stage in the national debate over how to reverse rising rates of childhood obesity. State legislative activity, sluggish at first, has quickly intensified in recent years. Summary reports from services such as the National Conference of State Legislatures (NCSL)¹ and picked up by the media tend to paint a positive picture of the momentum. For example, the NCSL reports that 2005 was “a watershed year for state legislation dealing with school nutrition.” Similarly, for 2005, the Health Policy Tracking Service (HPTS) reported “this year alone, 42 state legislatures have enacted or proposed measures that require or recommend nutritional guidance for schools.”²

Legislative activity, fueled in large part by a determined grassroots movement, has emerged with relatively meager resources, in contrast to amply funded industry interests. However, a closer look at the laws themselves is critical to prevent an exaggerated perception of progress from overshadowing reality. This article reviews several of the state laws that have been enacted thus far, and the compromises that enabled their passage. Much more needs to be done to improve school food. Moreover, the emerging patchwork quilt of laws strongly suggests a need for a more thoughtful public health approach that includes sound legal analysis outside of the realm of political compromise.

Most of the school food debate focuses on the sale of soda and snack foods, collectively known as “competitive foods” because they are sold outside the federal school meal program and compete with the sale of school meals. The U.S. Department of Agriculture (USDA) defines competitive foods as foods offered at school, other than meals served through school lunch, school breakfast and after-school snack programs.³ For public schools participating in the National School Lunch Program (NSLP), the USDA sets nutrition standards those schools must follow in order to get reimbursed by the federal government.⁴ With the exception of one regulation that does not allow the sale of soda or certain candy—dubbed “foods

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¹ NCSL, *Childhood Obesity—2005 Update and Overview of Policy Options*. Available at <http://www.ncsl.org/programs/health/ChildhoodObesity-2005.htm>. (Accessed Mar. 3, 2006).

² Nanci Hellmich, *Health movement has school cafeterias in a food fight; concern about child obesity brings slimmed-down fare, but will the kids go for it?* USA TODAY. (Aug. 22, 2005), p A 1. See also, Linda Jacobson, *California Says “No” to School Junk-Food Sales*, EDUCATION WEEK (Sept. 28, 2005), vol 25, Issue 5, p 20.

³ Letter from Shirley R. Watkins, Under-Sec’y. for Food, Nutrition, and Consumer Serv., USDA to the Honorable Tom Harkin, chairman, Comm. on Agric., Nutrition, and Forestry, U.S. Senate (Jan. 12, 2001), available at http://www.fns.usda.gov/cnd/Lunch/CompetitiveFoods/report_congress.htm (entitled *Foods Sold in Competition with USDA School Meal Programs: A Report to Congress*).

⁴ Requirements for School Food Authority Participation, 7 C.F.R. §210.10 (2005).

of minimal nutritional value” or (FMNV)⁵—in the food service area during meal-times, no federal nutrition standards apply to competitive foods, which may be sold elsewhere on school premises even during school lunch periods.⁶

To understand the absence of federal rules in this area requires some brief historical and legal context. Periodically throughout the 1970s, due to concerns over children’s health, the Secretary of Agriculture promulgated regulations that restricted the sale of sodas and certain candies in schools receiving federal funds for food programs from the beginning of the school day until the end of the last lunch period.⁷ In 1983, a federal court overturned these regulations based on a lawsuit brought by the National Soft Drink Association — now called the American Beverage Association (ABA) — and others who sued the USDA claiming that the agency had overstepped its regulatory bounds.⁸ Federal law was subsequently amended to conform to the court’s decision. The result was limited federal regulation of all FMNV (not just soda), which applied only to school food service areas at meal times.⁹ Thus, this legal victory for the ABA can be viewed as the watershed event for the increased presence of fast food, sugary drinks, and snack foods sold in schools throughout the school day, as well as for the shift in regulation (or lack thereof) to the state and/or local level.

II. LEGISLATIVE ACTIVITY

In recent years, in some ways substituting for federal action, state legislatures have become political battlegrounds over the sale of sugary soft drinks and high-fat, high-salt, and high-sugar, nutrient-deficient snack foods in public schools. From 2003-2005, 45 states introduced bills intended to limit the availability of such soft drinks and snacks in public schools.¹⁰ State legislative debates are fuelled by growing concerns over childhood obesity and by nutrition advocates’ efforts to promote change. Results of all the activity have been mixed: 21 states were successful in passing one or more bills, with a total of 34 bills enacted by those states during this time period.¹¹ In at least 10 instances, bills passed with weaker nutrition standards than originally introduced, a result of political lobbying and the inevitable compromise of policymaking. (In many other states, the bill as introduced was already weak, i.e., only minimal changes were required or suggested.¹²

An analysis that includes 2005-2006 activity¹³ found that 16 states have set nutrition standards on competitive foods, while 20 states have set time and place

⁵ FMNV are defined at 7 C.F.R. 210.11(b) (2005). Congress has introduced The Child Nutrition Promotion and School Lunch Protection Act of 2006, aimed at updating nutrition standards for competitive foods. Child Nutrition Promotion and School Lunch Protection Act of 2006, 109th CONG., S. 2592; Child Nutrition Promotion and School Lunch Protection Act of 2006, 109th CONG., H.R. 5167.

⁶ National Soft Drink Association v. Block, 721 F.2d 1348 (D.C. Cir. (1983)).

⁷ See E. Fried & M. Simon, *The Competitive Food Conundrum: Can Government Regulations Improve School Food?* DUKE LAW JOURNAL, (forthcoming).

⁸ *Id.* at 6.

⁹ Letter from Shirley R. Watkins, Under-Sec’y for Food, Nutrition, and Consumer Serv., USDA to the Honorable Tom Harkin, chairman, Comm. on Agric., Nutrition, and Forestry, U.S. Senate (Jan. 12, 2001), available at http://www.fns.usda.gov/cnd/Lunch/CompetitiveFoods/report_congress.htm (entitled *Foods Sold in Competition with USDA School Meal Programs: A Report to Congress*).

¹⁰ Data is on file with author, summarized from the following sources *State Actions to Promote Nutrition, Increase Physical Activity and Prevent Obesity: A Legislative Overview*, Health Policy Tracking Service, (July 11, 2005), available at <http://www.rwjf.org/files/research/July%202005%20-%20Report.pdf>; the National Conference of State Legislatures website (www.ncsl.org) and individual state websites.

¹¹ *Id.*

¹² *Id.*

¹³ FMNV are defined at 7 C.F.R. 210.11(b) (2005). Congress has introduced The Child Nutrition Promotion and School Lunch Protection Act of 2006, aimed at updating nutrition standards for competitive foods. See: <http://harkin.senate.gov/documents/pdf/schoolfood.pdf>.

restrictions.¹⁴ Sugary beverages in schools have garnered the most legislative activity, with 22 states limiting such sales. But only 10 states have rules that apply at all grade levels, and all times of the day, throughout the entire school.¹⁵ This recent data does not reflect the actual impact of the legislation, however, because it cannot account for the failure or success of implementation. In other words, simply passing legislation is not the same as actual enforcement in each school.

Moreover, while state legislators are becoming more successful in getting bills passed, there is wide variation in the provisions of each bill. What follows is an analysis of selected laws passed from 2003-2005 (mostly in 2005) that demonstrates the broad disparity of approaches, presumably resulting from the compromises being made. The as-yet unanswered question is whether presently enacted state legislation will prove to be an effective policy vehicle for changing the school food environment and ultimately improving children's health.

A. Setting Standards and Establishing Nutrition Committees

Generally states take two approaches to setting school nutrition standards: Either the standards are developed through the legislative process and appear in specific statutory language in the enacted final law; or a committee is established by law to later develop standards. There are pros and cons to each method. Because the legislative process is highly politicized and not always conducive to rational scientific evaluation, appointing a committee of experts to flesh out nutritional requirements may allow for a more rational approach. However, while potentially more limited in scope, the legislative process provides transparency and public accountability that administrative committee deliberations might not. Also, in some states, the law specifies committee composition; for example, New Mexico mandates inclusion of industry members, while others require varying combinations of parents, teachers, and sometimes even students, thereby potentially affecting the deliberation process and final outcome.

B. State versus Local Nutrition Standards

Another statutory variation is whether nutrition standards are set at the state or local level. While the usual purpose of a bill is statewide uniformity, sometimes the final law is compromised so that it allows individual schools or school districts to set their own standards. While setting any standards may be seen as a positive step, local action tends to be less efficient than statewide rules and may not include expert input from health professionals, lawyers, and others who can inform the process. Moreover, many of these statutes are unclear as to how local requirements will be enforced (since such language is lacking), which undermines one of the main motivations for passing a state law in the first place.

C. Required versus Mandatory Language

Another important statutory variation is the use of mandatory versus voluntary language that can affect key bill provisions. Certain words and phrases telegraph the statute's intent. For example, "establish" or "require" means that the specified

¹⁴ "F as in Fat: How Obesity Policies are Failing in America, 2006," *Trust for America's Health*, available at <http://healthyamericans.org/reports/obesity2006/>.

¹⁵ *School Food Report Card*, Center for Science in the Public Interest (CPSI), June 2006, available at: <http://www.cspinet.org/new/200606201.html>.

action is mandatory, but “recommend” or “urge” indicates that it is just voluntary. Obviously, a law that requires the setting of nutrition standards is better than one that merely gestures at their adoption. In fact, simply recommending or urging action is virtually the same as having no law at all—and may even be counter productive if lawmakers assume the problem is solved and take no further action. This represents another reason that a public health law approach is warranted.

Sometimes a study or pilot project is required before nutrition standards can be set, as in Washington State.¹⁶ While opponents of a bill may use this as a stall tactic, in some states, positive action has followed. Examples include Maine,¹⁷ which set up a commission, and California,¹⁸ which conducted pilot projects, both prior to passing laws. The primary downside of such an approach is the intervening delay.

Another variation in setting nutrition standards is the requirement that schools have a “wellness policy.” This is actually redundant since federal law requires schools participating in the NSLP have a wellness policy in place by the 2006 school year.¹⁹ This trend reflects yet another compromise tactic with questionable effect; it creates the appearance of positive legislative action, yet simply mirrors what is already required. Table I describes the various approaches.

Table 1: Variations in Establishing School Nutrition Laws

PROVISION	EXAMPLES
Sets statewide nutrition standards in bill language	California, ²⁰ Louisiana, ²¹ Tennessee, ²² Texas ²³
Establishes state-wide committee to set uniform standards (mandatory)	Arizona, ²⁴ Kentucky, ²⁵ New Mexico, ²⁶ South Carolina ²⁷
Recommends or urges state agency to set standards (voluntary)	Illinois ²⁸
Requires that schools/districts set standards (mandatory)	Texas ²⁹
Recommends that schools/districts set their own standards (voluntary)	Colorado, ³⁰ Nevada, ³¹ Utah ³²

¹⁶ S.B. 5436, 58th Leg., Reg. Sess. (Wash. (2003)).

¹⁷ Public Law Chapter 435, Sec. 1. 20-A MRSA c. 223, sub-c. 9 (law that implemented four of the Maine Commission’s key recommendations).

¹⁸ Pupil Nutrition, Health and Achievement Act of 2001, Chapter 913, Statutes of 2001.

¹⁹ S.2504, Child Nutrition and WIC Reauthorization Act of 2004, Section 204.

²⁰ S.B. 12, 2005-2006 Leg., Reg. Sess. (Cal. (2005)).

²¹ S.B. 146, Reg. Sess. (LA (2005)).

²² S.B. 2743 (TN (2004)).

²³ Texas Public School Nutrition Policy; available at http://www.agr.state.tx.us/foodnutrition/policy/food_nutrition_policy.pdf. (Accessed Apr. 10, 2006).

²⁴ H.B. 2544, 47th Leg., 1st Reg. Sess. (AZ (2005)).

²⁵ S.B. 172, 2005 Reg. Sess. (KY (2005)).

²⁶ H.B. 61 School Meal Nutrition Rules, Reg. Sess. (NM (2005)).

²⁷ H. 3346 Children’s Health Obesity Act, 116th Sess. (SC (2005-2006)).

²⁸ H.R. 0083, Soft Drink Substitution, 94th General Assembly (IL (2005)).

²⁹ S.B. 42, 79th Reg. Sess. (TX (2005)).

³⁰ S.B. 05-081, Concerning the adoption of school district board of education policies related to improving children’s nutrition, Reg. Sess. (CO (2005)).

³¹ Sen. Concurrent Res. No. 12, 72nd Sess. (NV (2003)).

³² H.J.R. 11, Resolution encouraging schools to adopt nutrition and physical activity policies, 2005 Gen Sess. (UT (2005)).

PROVISION	EXAMPLES
Expressly allows schools to impose stricter standards than state (but must follow state rules at a minimum)	Arizona, ³³ Kentucky, ³⁴ Tennessee ³⁵
Requires or encourages school to establish a wellness policy	Colorado, ³⁶ Oregon, ³⁷ Rhode Island ³⁸
Establishes committee to conduct a study and then make recommendations	Kansas, ³⁹ Maine ⁴⁰

D. School Grades Included in Standards

Only rarely do statewide nutrition standards apply to all grade levels. While Maine's regulations⁴¹ apply to grades K-12, this approach is the exception rather than the rule. In the world of legislative compromise, high schools have become a critical focal point.⁴² Those who do not want to restrict the sale of soft drinks and junk foods in high schools argue that a variety of options should be available because students are fully qualified to make their own nutritional choices. Underlying economic motivations are often influential, as school administrators rely on the perceived income flow to maintain certain school functions. High schools are where most soft drinks and snacks are sold,⁴³ so industry also has a vested interest in maintaining the status quo. Soda companies are keen to build brand loyalty in high schools, reaching teenagers at time when they make decisions that will last a lifetime.

In Tennessee,⁴⁴ high schools are altogether exempt from restrictions on sales of soda and snacks. Other state standards are stratified, with the most stringent guidelines applied to elementary schools; rules relax on the way up to middle and high schools. Examples of this approach include: Kentucky,⁴⁵ Oklahoma,⁴⁶ Texas⁴⁷

³³ H.B. 2544, 47th Leg., 1st Reg. Sess. (AZ (2005)).

³⁴ S.B. 172, 2005 Reg. Sess. (KY (2005)).

³⁵ S.B. 2743 (TN (2004)).

³⁶ S.B. 05-081, Concerning the adoption of school district board of education policies related to improving children's nutrition, Reg. Sess. (CO (2005)).

³⁷ S.B. 860, 73rd Legis Reg. Sess. (OR (2005)).

³⁸ S. 0565A, Jan. Sess. 2005 (RI (2005)).

³⁹ Letter from Shirley R. Watkins, Under-Sec'y for Food, Nutrition, and Consumer Serv., USDA to the Honorable Tom Harkin, chairman, Comm. on Agric., Nutrition, and Forestry, U.S. Senate (Jan. 12, 2001), available at http://www.fns.usda.gov/cnd/Lunch/CompetitiveFoods/report_congress.htm (entitled *Foods Sold in Competition with USDA School Meal Programs: A Report to Congress*).

⁴⁰ Public Law Chapter 435, Sec. 1. 20-A MRSA c. 223, sub-c. 9 (law that implemented four of the Maine Commission's key recommendations).

⁴¹ Ch. 51, Dept. of Ed. (ME (2006)); (accessed Apr. 10, 2006) <http://www.maine.gov/education/sfs/leg.htm>.

⁴² See Michele Simon, *APPETITE FOR PROFIT* (Nation Books, (2006)) Describes how in several state legislatures such as California and Arizona, debate has raged regarding whether high school kids are old enough to make "choices" when it comes to school vending. In reality, such debates are political cover for soda and food companies' desire to maintain their presence in schools.

⁴³ S.A. French et al., *Food environment in secondary schools: A la carte, vending machines, food policies, and practices*, AMERICAN JOURNAL OF PUBLIC HEALTH, Vol. 93, No. 7, 1161-1168 (July 2003).

⁴⁴ S.B. 2743 (TN (2004)).

⁴⁵ S.B. 172, 2005 Reg. Sess. (KY (2005)).

⁴⁶ Sec. 70-5-147 at http://www2.lsb.state.ok.us/os/os_70-5-147.rtf.

⁴⁷ Texas Public School Nutrition Policy; available at http://www.agr.state.tx.us/foodnutrition/policy/food_nutrition_policy.pdf. (Accessed Apr. 10, 2006).

and West Virginia.⁴⁸ Even in California, often held up as a national leader on this issue, while the same nutrition standards apply to grades K-12 for snack foods, the state set looser standards for beverages in middle and high schools.⁴⁹

Texas school nutrition guidelines⁵⁰ contain an elaborate breakdown for varying rules at elementary, middle, and high schools. But the public health justification for allowing French fries once a week in elementary school, yet three times a week in middle schools, is unclear. Another trend is to allow schools to follow lower standards if they are comprised of both high schools and middle school grades. For example, Louisiana⁵¹ defines high school as including schools that serve grades 6-12, and Texas⁵² allows schools that include K-12 to follow rules designated for middle schools.

E. Time of Day Rules

Statutes also vary as to the application of time of day sales restrictions. Political battles may ensue over whether after-school programs should be subject to any restrictions at all. Often, due to industry lobbying and school financial pressures, exclusion of after-school activities from soft drink or snack food sales restrictions becomes another compromise strategy. Maine is the only state to have thus far promulgated regulations⁵³ that apply at all times, a so-called "24/7" rule. In most states, such as Louisiana,⁵⁴ Kentucky⁵⁵ and West Virginia,⁵⁶ the restrictions apply during the school day only.

To complicate matters, the definition of school day and the time that restrictions apply varies. For example, Louisiana rules⁵⁷ are in force from one half-hour before the beginning of school day through one half-hour after the end of the school day, while in Kentucky⁵⁸ and West Virginia⁵⁹ the school day begins when the first student arrives and ends with the last period. Another confusing variation is when rules either start or end during the lunch period. For example, in Kentucky middle and high schools, regulations apply through the lunch period;⁶⁰ in Louisiana high schools, rule implementation inexplicably starts at the "last ten minutes of the lunch period."⁶¹

⁴⁸ HB 2816, Reg. Sess. (WV (2005)).

⁴⁹ S.B. 677, 2003-2004 Leg., Reg. Sess. (CA (2003)) (applying to elementary and middle schools). California later passed S.B. 965, 2005-2006 Leg., Reg. Sess. (CA (2005)). (applying to high schools). Note that standards are the same for middle and high schools, but contain certain exemptions that are not allowed for elementary schools.

⁵⁰ Texas Public School Nutrition Policy; available at http://www.agr.state.tx.us/foodnutrition/policy/food_nutrition_policy.pdf. (Accessed Apr. 10, 2006).

⁵¹ S.B. 146, Reg. Sess. (LA (2005)).

⁵² Texas Public School Nutrition Policy; available at http://www.agr.state.tx.us/foodnutrition/policy/food_nutrition_policy.pdf. (Accessed Apr. 10, 2006).

⁵³ Ch. 51, Dept. of Ed. (ME (2006)), (accessed Apr. 10, 2006) <http://www.maine.gov/education/sfs/leg.htm>.

⁵⁴ S.B. 146, Reg. Sess. (LA (2005)).

⁵⁵ S.B. 172, 2005 Reg. Sess. (KY (2005)).

⁵⁶ HB 2816, Reg. Sess. (WV (2005)).

⁵⁷ S.B. 146, Reg. Sess. (LA (2005)).

⁵⁸ S.B. 172, 2005 Reg. Sess. (KY (2005)).

⁵⁹ HB 2816, Reg. Sess. (WV (2005)).

⁶⁰ S.B. 172, 2005 Reg. Sess. (KY (2005)).

⁶¹ S.B. 146, Reg. Sess. (LA (2005)).

F. Types of Food and Exemptions

There is also wide variation in types of food restrictions. Few laws, like California's,⁶² apply to all competitive foods, while others, such as Maine⁶³ and Oklahoma⁶⁴ laws, only apply to FMNV. In Kentucky,⁶⁵ competitive foods exclude "a la carte" foods, which are individual food items (such as pizza) sold alongside the complete school meal and are also often unhealthy.

Another variation allows specific food and event exemptions. It is rare that, as in Texas,⁶⁶ restrictive food rules apply to all food sold anywhere on school grounds. It is more common for exemptions to be made, especially for fundraisers. Louisiana exempts fundraisers at any time,⁶⁷ while most other states place conditions around fundraiser sales. For example, California⁶⁸ allows otherwise restricted foods to be sold only at fund-raisers held after school; Arizona,⁶⁹ Kentucky,⁷⁰ New Mexico⁷¹ and West Virginia⁷² if fund-raising is conducted off school property; and Tennessee⁷³ if fund-raisers are conducted either after school or off school property.

Most states exempt food brought from home, at least implicitly, as the standards usually apply to food *sold* in schools. But a few states explicitly exempt food from home. For example, Texas⁷⁴ exempts food from parents or grandparents for their child's birthday celebration or for school functions. Arizona⁷⁵ explicitly exempts teachers or other adults from restrictions where food sale is limited to adults. In particularly broad language, Kentucky⁷⁶ grants "waivers" that must be reviewed annually.

III. SETTING NUTRITION STANDARDS

Laws vary widely in the language used to set nutrition standards, whether the process is at the legislative level or by committee. While the language of "banning" certain foods and beverages in schools has become popular in the media, in fact most policies simply set nominal nutrition standards for products that can be sold in schools.

Some statutes limit ingredients such as fat and sugar, while others use positive language to delineate what items are allowed, such as water and juice. Many exemptions are made; a common one being for "sports" drinks, which can contain almost as much sugar as soda. (California was not immune from this concession to allow sports drinks in middle and high schools.) Another major compromise is to require that only one-half of the items offered for sale in schools meet nutrition standards, which can undermine the policy significantly since students are still tempted by the less healthy options.

⁶² S.B. 12, 2005-2006 Leg., Reg. Sess. (CA (2005)).

⁶³ Ch. 51, Dept. of Ed. (ME (2006)), (accessed Apr. 10, 2006) <http://www.maine.gov/education/sfs/leg.htm>.

⁶⁴ S.A. French et al., *Food environment in secondary schools: A la carte, vending machines, food policies, and practices*, AMERICAN JOURNAL OF PUBLIC HEALTH, Vol. 93, No. 7, 1161-1168 (July 2003).

⁶⁵ S.B. 172, 2005 Reg. Sess. (KY (2005)).

⁶⁶ Texas Public School Nutrition Policy, available at http://www.agr.state.tx.us/foodnutrition/policy/food_nutrition_policy.pdf. (Accessed Apr. 10, 2006).

⁶⁷ S.B. 146, Reg. Sess. (LA (2005)).

⁶⁸ S.B. 12, 2005-2006 Leg., Reg. Sess. (CA (2005)).

⁶⁹ H.B. 2544, 47th Leg., 1st Reg. Sess. (AZ (2005)).

⁷⁰ S.B. 172, 2005 Reg. Sess. (KY (2005)).

⁷¹ H.B. 61 School Meal Nutrition Rules, Reg. Sess. (NM (2005)).

⁷² HB 2816, Reg. Sess. (WV (2005)).

⁷³ S.B. 2743 (TN (2004)).

⁷⁴ Texas Public School Nutrition Policy; available at http://www.agr.state.tx.us/foodnutrition/policy/food_nutrition_policy.pdf (accessed Apr. 10, 2006).

⁷⁵ H.B. 2544, 47th Leg., 1st Reg. Sess. (AZ (2005)).

⁷⁶ S.B. 172, 2005 Reg. Sess. (KY (2005)).

In West Virginia,⁷⁷ high schools are required to offer “healthy” beverages “... in the same location or substantially similar location as vending machines containing soft drinks.” Variations in beverages offered vary from state to state because definitions of “healthy” are themselves varied. For example, in West Virginia,⁷⁸ “healthy beverage” means water, 100 percent fruit and vegetable juice, low-fat milk and other juice beverages with a minimum of 20 percent real juice. California,⁷⁹ however, allows fruit drinks with no less than 50 percent juice and no added sweeteners.

Some states also take cooking styles into account when setting healthy nutrition standards. For example, Kentucky⁸⁰ prohibits deep-frying. In Texas,⁸¹ fried potato serving sizes are limited to no more than 3 oz. and may be served no more than once per week in elementary schools and three times a week in middle schools, but an unlimited number of times in high schools. (The stated goal is to eventually phase out frying altogether.)⁸² See Table 2 for more specific examples.

Table 2: Variations in School Nutrition Standards

PROVISION	EXAMPLES
Restrictions based on portion size and/or calories	California, ⁸³ Louisiana, ⁸⁴ Texas ⁸⁵
Limits on levels or percentage of sugar, fat, and/or saturated fat	California, ⁸⁶ Kentucky ⁸⁷
Restrictions based on percentage of fruit or vegetable juice	California, ⁸⁸ Louisiana, ⁸⁹ West Virginia ⁹⁰
Restrictions on types or amount of sweeteners	California, ⁹¹ Louisiana ⁹²
Restrictions on types of dairy drinks	Louisiana, ⁹³ Texas ⁹⁴

⁷⁷ HB 2816, Reg. Sess. (WV (2005)).

⁷⁸ HB 2816, Reg. Sess. (WV (2005)).

⁷⁹ S.B. 677, 2003-2004 Leg., Reg. Sess. (CA (2003)) (applying to elementary and middle schools). California later passed S.B. 965, 2005-2006 Leg., Reg. Sess. (CA (2005)) (applying to high schools). Note that standards are the same for middle and high schools, but contain certain exemptions that are not allowed for elementary schools.

⁸⁰ S.B. 172, 2005 Reg. Sess. (KY (2005)).

⁸¹ Texas Public School Nutrition Policy; available at http://www.agr.state.tx.us/foodnutrition/policy/food_nutrition_policy.pdf, (accessed Apr. 10, 2006).

⁸² S.B. 172, 2005 Reg. Sess. (KY (2005)).

⁸³ S.B. 12, 2005-2006 Leg., Reg. Sess. (CA (2005)).

⁸⁴ S.B. 146, Reg. Sess. (LA (2005)).

⁸⁵ Texas Public School Nutrition Policy; available at http://www.agr.state.tx.us/foodnutrition/policy/food_nutrition_policy.pdf, (accessed Apr. 10, 2006).

⁸⁶ S.B. 12, 2005-2006 Leg., Reg. Sess. (CA (2005)).

⁸⁷ S.B. 172, 2005 Reg. Sess. (KY (2005)).

⁸⁸ *Id.* at 79.

⁸⁹ S.B. 146, Reg. Sess. (LA (2005)).

⁹⁰ HB 2816, Reg. Sess. (WV (2005)).

⁹¹ *Id.* at 79.

⁹² S.B. 146, Reg. Sess. (LA (2005)).

⁹³ S.B. 146, Reg. Sess. (LA (2005)).

⁹⁴ Texas Public School Nutrition Policy; available at http://www.agr.state.tx.us/foodnutrition/policy/food_nutrition_policy.pdf, (accessed Apr. 10, 2006).

PROVISION	EXAMPLES
Restrictions based on cooking method	Kentucky, ⁹⁵ Texas ⁹⁶
Restrictions on specific foods	Louisiana ⁹⁷
Exemptions for diet soda	Kentucky, ⁹⁸ Oklahoma ⁹⁹
Exemptions for sports drinks	California, ¹⁰⁰ Tennessee ¹⁰¹
Requires that at least 50 percent of products meet nutrition standards	Louisiana, ¹⁰² West Virginia ¹⁰³
Requires limits on “fast food”	Kentucky ¹⁰⁴
Requires “healthy food”	Oklahoma, ¹⁰⁵ West Virginia ¹⁰⁶

IV. OVERSIGHT, COMPLIANCE AND EFFECTIVE DATES

An important component to any law is its provisions for compliance. Once a law is passed, there needs to be some guarantee of implementation and ongoing enforcement. Most school nutrition laws lack enforcement provisions in their statutory language. However, states may have pre-existing mechanisms for enforcement of new school-related statutes. Some states set up committees to monitor compliance and impose penalties. For example, Kentucky¹⁰⁶ fines schools for non-compliance based on competitive food sales. In contrast, Tennessee¹⁰⁷ requires reimbursement from the vendor for penalties assessed on schools that have sold foods not in compliance with nutrition standards. In West Virginia,¹⁰⁸ non-compliance by “any person” is defined as a misdemeanor offense, punishable by no more than \$10 per violation, per week. Texas¹⁰⁹ has established a committee that reports to the state’s agriculture department, the state entity that monitors compliance. Maryland¹¹⁰ has the only state statute that explicitly requires a timing device on vending machines, presumably as a tool for compliance.

Another important component related to compliance is the date the legislation becomes effective. Some laws, such as in Kentucky,¹¹¹ require compliance by the

⁹⁵ Texas Public School Nutrition Policy; *available at* http://www.agr.state.tx.us/foodnutrition/policy/food_nutrition_policy.pdf, (accessed Apr. 10, 2006).

⁹⁶ S.B. 146, Reg. Sess. (LA (2005)).

⁹⁷ S.B. 172, 2005 Reg. Sess. (KY (2005)).

⁹⁸ Sec. 70-5-147 *at* http://www2.lsb.state.ok.us/os/os_70-5-147.rtf.

⁹⁹ S.B. 677, 2003-2004 Leg., Reg. Sess. (CA (2003)) (applying to elementary and middle schools). California later passed S.B. 965, 2005-2006 Leg., Reg. Sess. (CA (2005)) (applying to high schools). Note that standards are the same for middle and high schools, but contain certain exemptions that are not allowed for elementary schools.

¹⁰⁰ S.B. 2743 (TN (2004)).

¹⁰¹ S.B. 146, Reg. Sess. (LA (2005)).

¹⁰² HB 2816, Reg. Sess. (WV (2005)).

¹⁰³ S.B. 172, 2005 Reg. Sess. (KY (2005)).

¹⁰⁴ Sec. 70-5-147 *at* http://www2.lsb.state.ok.us/os/os_70-5-147.rtf.

¹⁰⁵ HB 2816, Reg. Sess. (WV (2005)).

¹⁰⁶ S.B. 172, 2005 Reg. Sess. (KY (2005)).

¹⁰⁷ S.B. 2743 (TN (2004)).

¹⁰⁸ HB 2816, Reg. Sess. (WV (2005)).

¹⁰⁹ S.B. 42, 79th Reg. Sess. (TX (2005)).

¹¹⁰ SB 473, Student health promotion act of 2005, Reg. Sess. (MD (2005)).

¹¹¹ S.B. 172, 2005 Reg. Sess. (KY (2005)).

following school year. Other statutes include a long phase-in period to give schools time to change the products they sell. For example, California's food nutrition standards,¹¹² passed in 2005, are not required to take effect until 2007, while the beverage standards law¹¹³ for high schools (also enacted in 2005) has an even longer phase-in period: a 50/50 mix of healthy/unhealthy beverages is required by 2007 with complete turnover by 2009. Oklahoma¹¹⁴ and Maine¹¹⁵ also allow for a long phase-in period.

Another statutory variation permits schools to avoid implementation of nutrition standards where the law explicitly excludes "current" soda or food contracts with vendors. For example, Louisiana¹¹⁶ explicitly exempts current contracts, while Arizona¹¹⁷ bars new or renewed contracts from selling FMNV. Another compromise extends current contracts, which can result in delaying or even avoiding compliance. However, most laws are silent on whether new regulations apply to current contracts, leaving the matter unsettled.

A. *Additional Variations*

States often include statutory provisions that may not directly relate to the nutritional quality of school food. For example, Kentucky requires minimum education credentials for food service workers.¹¹⁸ South Carolina's school nutrition law establishes a minimum time for students to eat lunch (but only in elementary schools).¹¹⁹ The Colorado law emphasizes the importance of fresh, locally-grown produce (although this provision is voluntary).¹²⁰ Maine requires its schools to implement the National Farm to School Program.¹²¹ Maine and Kentucky both require nutrition information to be available either by posting in food service areas (Maine, for a la carte items)¹²² or by annual report (Kentucky).¹²³

V. OBSTACLES AND CHALLENGES

When trying to pass legislation, politicians and advocates face myriad obstacles. A combination of intensive corporate lobbying and (in some cases) resistance from local school boards can stall progress. As a result, states often require several sessions and multiple legislative amendments before laws are passed and signed into law. While incremental policy change is common, a slow pace is unacceptable

¹¹² S.B. 172, 2005 Reg. Sess. (KY (2005)).

¹¹³ S.B. 677, 2003-2004 Leg., Reg. Sess. (CA (2003)) (applying to elementary and middle schools). California later passed S.B. 965, 2005-2006 Leg., Reg. Sess. (CA (2005)) (applying to high schools). Note that standards are the same for middle and high schools, but contain certain exemptions that are not allowed for elementary schools.

¹¹⁴ Sec. 70-5-147 at http://www2.lsb.state.ok.us/os/os_70-5-147.rtf.

¹¹⁵ Public Law Chapter 435, Sec. 1. 20-A MRSA c. 223, sub-c. 9 (law that implemented four of the Maine Commission's key recommendations).

¹¹⁶ S.B. 146, Reg. Sess. (LA (2005)).

¹¹⁷ H.B. 2544, 47th Leg., 1st Reg. Sess. (AZ (2005)).

¹¹⁸ S.B. 172, 2005 Reg. Sess. (KY (2005)).

¹¹⁹ H. 3346 Children's Health Obesity Act, 116th Sess. (SC (2005-2006)).

¹²⁰ S.B. 05-081, Concerning the adoption of school district board of education policies related to improving children's nutrition, Reg. Sess. (CO (2005)).

¹²¹ Public Law Chapter 435, Sec. 1. 20-A MRSA c. 223, sub-c. 9 (law that implemented four of the Maine Commission's key recommendations).

¹²² Public Law Chapter 435, Sec. 1. 20-A MRSA c. 223, sub-c. 9 (law that implemented four of the Maine Commission's key recommendations).

¹²³ S.B. 172, 2005 Reg. Sess. (KY (2005)).

given increasing rates of childhood obesity, diabetes, and other chronic conditions previously relegated to adulthood.

The current public health crisis needs swift action. Yet food and beverage companies and their trade associations hire numerous high-priced lobbyists that overwhelm the meager resources of nutrition advocates.¹²⁴ Additionally, corporations have an ability to make political campaign contributions that advocates do not have. Whether or not a direct “quid pro quo” could be proven, the possibility of undue influence remains real. Moreover, in a number of states, the connection between corporate money and adverse impact on legislation has been made. For example, an initially strong 2005 Oregon bill ultimately passed, but with weakened standards. Perhaps not coincidentally, the Oregon Soft Drink Association made hefty campaign contributions to key legislative members; in total, the soft drink lobby gave \$91,000 to Oregonian legislators in the fall of 2004.¹²⁵

As this analysis suggests, the politics of compromise can often result in policymaking with inadequate public health enforcement. Indeed, industry efforts to establish and maintain a presence in schools—from the soft drink industry’s 1983 lawsuit to thwart federal regulation, to current lobbying to kill or dilute state legislation—must stop if meaningful nutrition standards are to be both mandated and enforced.

State legislators, nutrition advocates, school administrators, teachers, parents, and students are to be applauded for seeking to improve the nutrition of school foods. Advocates face enormous obstacles and challenges. Also, this analysis tracks a relatively early stage of legislative and regulatory developments. As some states gain ground, others may follow and continue on a path of incremental policy change. While it may be too early to tell if the future promises more robust improvements, the numerous challenges are likely to continue.

VI. CONCLUSION

While several Federal government reports have attempted to focus attention on the problem of unhealthy school food¹²⁶ and have offered some policy solutions,¹²⁷ and others give states “grades,”¹²⁸ none has detailed the degree of uneven state-wide efforts that is hampering a consistent nationwide approach.

The school food environment is critical to every child’s development. Addressing this public health challenge was first attempted more than half a century ago with the creation of the federal school meal programs, when the concern was primarily undernourishment. Now, with rising rates of childhood obesity and diabetes, the nation is grappling with easy access to an abundance of unhealthful foods and beverages. Sugary beverages and nutrient-deficient, highly processed foods have been steadily encroaching on public schools over the past thirty years. Moreover,

¹²⁴ See Michele Simon, *APPETITE FOR PROFIT*. In Connecticut, \$250,000 was spent by the soft drink industry to lobby against school legislation in that state.

¹²⁵ Editorial, *Junk Food Jitterbug: Vicki Walker Dances Away From Tougher Rules*, *THE REGISTER-GUARD*, (Eugene, OR (May 16, 2005)), at A10.

¹²⁶ GAO, *School Meal Programs: Competitive Foods are Widely Available and Generate Substantial Revenues for Schools*, GAO-05-563 (Wash., D.C. (Aug. 8, 2005)).

¹²⁷ GAO, *School Meal Programs: Competitive Foods are Available in Many Schools; Actions Taken to Restrict Them Differ by State and Locality*, GAO-04-673 (Wash., D.C. (Apr. 23, 2004)).

¹²⁸ Data is on file with author, summarized from the following sources *State Actions to Promote Nutrition, Increase Physical Activity and Prevent Obesity: A Legislative Overview*, Health Policy Tracking Service, (July 11, 2005), available at <http://www.rwjf.org/files/research/July%202005%20-%20Report.pdf>; the National Conference of State Legislatures website (www.ncsl.org) and individual state websites.

science continues to demonstrate the connection between the over-consumption of unhealthy food and beverages and children's health.¹²⁹

Given the realities of the politics of compromise and the slowness of the process, the hard question that must be brought into focus becomes: Is it effective public health policy when every state attempts to pass legislation that results in an uneven patchwork of compromised health initiatives implemented on a piecemeal basis? Local, rather than federal or even statewide, control has resulted in different nutritional standards and food availability that can vary not only from state to state, but also by district, and even among grade levels. It makes no sense to educate students about good nutrition when readily available sugary soft drinks and high fat, high calorie snack foods remain just steps outside the classroom door.

What is needed is a more structured, carefully planned approach to policymaking. Well-meaning politicians and advocates are rushing to try and "fix" the problem of childhood obesity without fully considering the consequences of compromised legislation. Moreover, the lack of meaningful enforcement mechanisms can negate all the hard work of getting a bill passed.

The obvious alternative to a system of disparate state laws is a strong national approach. A bill that would require USDA to update its outdated competitive food nutrition standards is currently pending in Congress.¹³⁰ Whether that bill will pass, and even if it does, whether USDA will promulgate meaningful and enforceable health-promoting standards remains to be seen.

Meanwhile, it is likely that the current local and state battles will continue. For state legislation to support a viable policy strategy to improve school food, the following suggestions are offered to address current inconsistencies:

- A team of health professionals that includes nutritionists, lawyers, food service staff and politicians, should be consulted before beginning to draft potential legislation and should remain involved through implementation phases; and
- Meaningful enforcement mechanisms should be considered and placed into the bill language, including making explicit who is responsible for ongoing oversight; and
- Lawyers with expertise in school food procurement and contract analysis be consulted during implementation to ensure the school's best financial position and address the application of the legislation to current and future contracts.

Finally, even though most activity is occurring on the local level, a necessary, but neglected dialogue must focus on whether changing the school food environment on the local level warrants such enormous grassroots efforts. Should that ever-increasing energy now be directed elsewhere, such as working to return meaningful oversight to the federal level? Would federal lawmaking be less prone to the pressures of compromise that are gutting strong state proposals?

It is time to call upon the public health community—including nutrition, legal and other experts—to come together and form a workable strategic plan to help improve school nutrition. We can no longer allow the vagaries of legislative politics to guide the way children eat. In the absence of thoughtful and consistent policy-making, the current chaotic trend will continue with related untoward consequences. Childhood obesity is a public health problem that requires sound policy solutions in the interest of children's health.

¹²⁹ Martha Y. Kubik, Leslie A. Lytle & Mary Story, *Schoolwide Food Practices Are Associated With Body Mass Index in Middle School Students*, ARCH PEDIATR ADOLESC MED. (2005), 159:1111-1114.

¹³⁰ Child Nutrition Promotion and School Lunch Protection Act of 2006, 109th CONG., S. 2592; Child Nutrition Promotion and School Lunch Protection Act of 2006, 109th CONG., H.R. 5167.