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## WLF Advises USDA To Drop “Junk Food” Ad Ban From School Nutrition Proposal

*(In re: Food & Nutrition Service Local School Wellness Policy Implementation)*

**“The Department of Agriculture cannot pursue its nutrition education goals in public schools by discriminating against certain ‘disfavored’ but truthful commercial speech.”—Glenn Lammi, WLF Chief Counsel for Legal Studies**

WASHINGTON, DC—The Washington Legal Foundation (WLF) has called on the Department of Agriculture (USDA) to withdraw a local school wellness policy proposed rule that would discriminate against certain “disfavored” speakers and their commercial messages. In formal comments filed yesterday, WLF advises USDA that its content-based prohibition of some advertisements on public school grounds would violate the First Amendment.

At a carefully choreographed White House event on February 26, the Obama Administration announced that USDA’s Food and Nutrition Service (FNS) would prohibit advertising in schools for products that didn’t meet federal “Smart Snacks” guidelines. The agency said it would take the unprecedented action even before determining whether other steps the proposal mandated to improve student health, such as banning the sale of non-compliant snacks and expanding nutrition education efforts, were effective. The FNS proposal explicitly allows producers of “Smart Snacks,” such as diet versions of soda and reduced-sugar yogurts, to advertise in schools. Local school districts, which rely upon federal funding for their lunch programs, are required under the proposed rule to include these policies in their school wellness plans.

WLF argues in its comments that the FNS proposal not only violates the rights of advertisers and consumers, but also imposes unconstitutional conditions on local school officials’ receiving federal funds. Such content-based discrimination against commercial speech can rarely be justified, and WLF notes that FNS offers no acceptable neutral justification for the ban. The proposed speech restriction would also fail under Supreme Court precedents requiring government to prove its speech restrictions advance a substantial governmental interest in a direct and material way and that a reasonable fit exists between the proposal’s means and ends.

After filing comments, WLF issued a quote by Chief Counsel for Legal Studies, Glenn Lammi: “The Department of Agriculture cannot pursue its nutrition education goals in public schools by discriminating against certain ‘disfavored’ but truthful commercial speech. A misguided USDA has chosen an expedient, superficial approach to promoting student health, one which will both prove ineffective and expose it—and local school boards—to First Amendment challenges. The proposal treads on the core constitutional value that government restrictions on speech should be the last, not the first, option to address even problems as serious as childhood obesity.”

*WLF is a public interest law firm and policy center that regularly advocates in defense of the First Amendment, including challenging agencies’ attempts to regulate commercial free speech.*