Government Speech and Advertising on School Grounds:
How One Case May Have Enabled Schools to Embrace Advertising Revenue while Eliminating the Liability Associated with the Limited Open Forum

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“Congress shall make no law… abridging the freedom of speech.”1

In public schools, this concept is far easier to state than to implement or understand. Courts have interpreted the First Amendment to offer varying levels of protection, depending upon the speaker, the message, and the location. It is a well-known fact that different rules apply to political speech, commercial speech, student speech, unprotected speech, etc. Scholars have been pondering, debating, and writing treatises about this ever-evolving topic for decades. Any school that needs to raise capital through advertising, has always taken a significant legal risk in opening up their forum to public speech through advertising. Even with careful and vigilant planning, schools have historically subjected themselves to costly lawsuits anytime they made decisions regarding the acceptance or denial of advertising content. A recent case that arose out of West Palm Beach, Florida, however, may have changed the game entirely, offering schools a way to accept much-needed advertising revenue without opening the forum door. In order to understand the

1 U.S. Const. Amend. I.
significance of this pivotal case, however, it is necessary to fully understand the forum analysis as it has traditionally applied to advertising in public schools and the potential for legal challenge that opening the public forum creates.

**Limited Public Forum Explained**

Generally, public schools are considered a nonpublic forum. Third parties have no Constitutional right to speech within the schools unless the school, itself, provides it by opening a forum. A limited public forum is opened by allowing third-party access through general advertising rules and/or permissions.

In a limited public forum, schools may restrict speech with some limitations. When determining whether a forum is nonpublic or limited, there are two basic factors. Courts will look at what access has been granted in the past and what the school’s policy/procedures permit and/or limit. For example, if a district has a policy that permits advertising on fence signs around its football stadium, a limited public forum exists. Policy is not everything, though. Where a school’s practice differs from its policy, the practice will likely be the determinative factor. For instance, if a district has a policy that does not permit advertising, but the athletic department has traditionally allowed advertising at its events, and the school has not prohibited that practice, a limited public form exists in that case, as well, due to the fact that the school’s practices permit the advertising.

Schools may have more than one type of forum within their boundaries. For instance, a school may permit advertising in its football stadium but not within the school building, itself. In

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that instance, the school has created a limited public forum in the football stadium but a nonpublic forum in the school building. Definitive policy language, as well as consistent practices that carefully adhere to the policies set forth, ensure that these designations as determined by the school board and/or school administration, remain clear and accurate. In such cases, the rules and legal requirements are clear. Trouble brews where school administrators permit flexibility with rules and policy language, however. Many school administrators open schools to limited-public-forum status without realizing it through their practices.

**Commercial Speech**

In a nonpublic forum, with both private and commercial speech, schools may make time, place and manner restrictions, but all restrictions must be content-neutral.\(^4\) Where a limited public forum is opened for the purposes of commercial speech, a test is applied to assess whether restrictions on that commercial speech are constitutional.\(^5\) The test is presented in the flowchart, below:

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\(^4\) *Id.* See also *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. Of the Law v. Martinez*, 561 U.S. 661, 130 S. Ct. 2971 (2010).

\(^5\) *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343 (1980). The original 4th-prong of the *Central Hudson* test (what would have been the last question on the flowchart) held that the regulation must be narrowly drawn and no more extensive than is necessary to serve the state’s interest. This prong was strengthened in *Bd. of Trustees of Suny v. Fox*, 109 S.Ct. 3028 (1989), and the flowchart, here, reflects that change.
A tricky aspect of the analysis is the fact that there is no clear-cut definition of “commercial speech,” and many scholars believe that the fact that the U.S. Supreme Court has not yet provided
one is due to the fact that the classification of commercial speech is inherently difficult.\textsuperscript{6} Private speech, however, is afforded more protections, and all permissible restrictions in a limited open forum (time, place and manner restrictions and restrictions based on subject matter and/or class of speaker) must be viewpoint-neutral.

**Mixed-Message Speech**

To make matters even more complex, commercial speech may be intermingled in a single ad with noncommercial private speech, resulting in what the U.S. Supreme Court has deemed to be “mixed motives” speech.\textsuperscript{7} The determinative factor as to whether the speech is “mixed-message” speech, rather than simply two different components of speech “act” are “inextricably intertwined. Examples of “inextricably intertwined” speech are an advertisement for a 4\textsuperscript{th}-of-July sale that contains patriotic symbols and messages or solicitation of contributions for a charitable organization.\textsuperscript{8} The Court affords “mixed-message” speech the same protections as private speech, which is the greater of the two protections.\textsuperscript{9} Not all speech acts that contain a commercial component and a private speech component are “inextricably intertwined,” though. In *Board of Trustees of the State University of New York v. Fox*,\textsuperscript{10} the university wished to ban on-campus Tupperware parties using the less-protective commercial speech analysis. The opponents to the ban argued that the application of the more restrictive test was unconstitutional. They argued that


\textsuperscript{7} See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), (holding that that an ordinance and license tax on evangelists was unconstitutional due to the fact that the sale of religious literature does not turn evangelism into commercial speech).


\textsuperscript{9} Id.

\textsuperscript{10} 492 U.S. 469 (1989).
, because Tupperware parties touched upon other topics, “such as how to be responsible and how to run an efficient home,” the parties constituted “mixed-message” speech. The Court didn’t buy the argument, humorously holding that “[n]o law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.”

So what are schools to make of these analyses? The safest, most legally-conservative course of action is to presume that all speech will be afforded the broader protections available to private speech in a limited public forum. In today’s world of market research and savvy, effective advertising, the vast majority of ads are going to contain at least some non-commercial speech. To expect school administrators to perform a Blackmun-esque legal analysis for every submission is, at best, impractical, and arguably impossible, given the frequently confusing analyses of “mixed-message” cases. Schools should, rather, craft policies to assume that the speech should be afforded the standard limited-open-forum protections and limit their regulations to time, place and manner restrictions and viewpoint-neutral subject matter and class-of-speaker restrictions.

**Determining the Right Level of Restriction for a School**

Schools can eliminate advertising-related liability altogether by adopting policies that do not permit 3rd-party advertisements on school grounds. However, in today’s economic climate, schools may depend upon at least *some* advertising revenue. Thus, school boards must carefully weigh the financial need against the complexities of First-Amendment rights of advertisers to determine the best course of action.
In limited public forums, schools may make subject matter or class-of-speaker restrictions as long as they are reasonable and viewpoint-neutral. A policy is viewpoint neutral if it restricts all advertising speech on a given subject.\(^{11}\) For instance, schools could make generalized restrictions prohibiting all religious and/or political messages in advertisements. In making such restrictions, the school is limiting the types of messages that can be included without basing the restriction on any specific viewpoint.

One example of this type of restriction can be found in *DiLoreto v. Downey School District*.\(^{12}\) In that case, a school booster club raised funds by soliciting ads from local businesses, and the ads were posted on the baseball field fence. The Loreto family trust purchased an ad with the message “For Peace in Our Day! Pause and Meditate on These Principles to Live By!” and, beneath that text, included the text of the 10 Commandments. The school rejected the sign. The 9\(^{th}\) Circuit applied the nonpublic forum analysis. In the past, the school had rejected advertisements for taverns and Planned Parenthood, both considered controversial matters. In addition, the school never permitted any political, religious or controversial public issues in its advertising. The Court found that the restriction was reasonable. The forum was opened for the express purpose of commercial advertising and for the school to make money, not for the purpose of political or religious expression. The Court also held that the school’s restrictions targeted a particular subject matter, not the particular views taken by the speakers on a subject. The Court noted that the district’s decision did not disfavor religious viewpoints, because all ads with a political, social or controversial agenda were excluded. Note that it was the *content* of the ad that

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was restricted in this case, not the speaker. Had a religious organization purchased the ad to advertise for a product or service, the result may have been different.

In Lebron v. Amtrak, Lebron rented a billboard and developed an advertisement that he characterized as an allegory about the destructive influence of a materialistic culture. The 2nd Circuit applied the limited public forum analysis due to the fact that, while Amtrak is not incorporated as a government entity, the public and private entities functioned together to the point where the First Amendment applied to restrictions of speech made by Amtrak. In that case, Amtrak prohibited political speech in all advertising space, and the Court upheld this as a reasonable and viewpoint-neutral restriction.

**History of Enforcement Critical**

Schools should be aware, however, that, as explained above, it is not only the restrictions set forth in the entity’s policy that matter, but also the history of enforcement of such restrictions. For instance, in Christ’s Bride Ministries, Inc. v. SEPTA, South East Pennsylvania Transit Authority officials removed 4-by-5 foot posters sponsored by the religious group that said “Women Who Choose Abortion Suffer More & Deadlier Breast Cancer.” Although SEPTA did have a policy prohibiting political and religious messages, it did not enforce that policy. In addition, the posters were removed not due to the policy restrictions, but, rather, due to the public outcry related to their content. The 3rd Circuit noted that SEPTA had accepted numerous advertisements for display, including on the topics of religion and abortion. “In its efforts to

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14 148 F.3d 242 (3d Cir. 1998).
generate advertising revenues, SEPTA permitted abortion-related and other controversial advertisements concerning sexuality.” SEPTA’s actions, in that case, took precedence over the language of the policy for the purposes of the First Amendment determination. This is an important training point for school administrators. Their actions can negatively impact the legal-defensibility of even the most carefully-crafted policy language.

**Side-Stepping the Forum Analysis: Mech’s Viable Solution**

An issue that has garnered a lot of attention in the courts, and that we will likely see far more of, is the distinction between *government speech* and commercial/private speech. The Palm Beach County School District recently successfully argued a case on this specific issue in *Mech v. School Bd. of Palm Beach County*.¹⁵ In that case, the school board adopted a policy permitting the hanging of banners on the fence of the football stadium to recognize sponsors of the athletic program. The policy clearly stated the District’s intent not to open any type of public forum but, instead, serve as “recognition of business partners on school campuses.”

Mech has what the 11ᵗʰ Circuit court called a “unique resume.” The service promoted on the banner at issue in the case was a math tutoring service called “The Happy/Fun Math Tutor.” Mech has a master’s degree, was enrolled in a Ph.D. program at Florida Atlantic University, had secondary-level teacher certification in Florida, and taught mathematics at Palm Beach State College. As for the “unique” part – Mech was also a retired porn star who had performed in hundreds of porn films and was the owner of a pornography company. And the crux of the problem… the tutoring service and the porn company were located at the same address.

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¹⁵ *Mech v. School Board of Palm Beach County, Florida, 806 F.3d 1070 (11th Cir. 2015) cert denied 137 S.Ct. 73 (2016).*
The District was not originally aware of the link between Mech’s two businesses. In fact, in 2010, representatives of the school encouraged him to sponsor one of the banners, which required a minimum donation of $250-$650. When the school discovered the connection to the pornography company (through complaints of other parents), they removed the banner and informed him that his position with the pornography company, in conjunction with the fact that it shares the same principal place of business with the tutoring company, “creates a situation that is inconsistent with the educational mission of the Palm Beach County School Board and the community values.”

The lower court applied a First Amendment analysis, holding that the school was permitted to remove the banner due to the fact that they were removed due to the common ownership of the two companies, not due to the banner’s content. The 11th Circuit affirmed the lower court’s decision, but on different grounds. The 11th Circuit stated the issue clearly and succinctly:

If the banners are government speech, Mech loses. The Free Speech Clause of the First Amendment ‘restricts government regulation of private speech; it does not regulate government speech.’ […]16 When the government exercises ‘the right to speak for itself,’ it can freely ‘select the views that it wants to express.’17 This freedom includes ‘choosing not to speak’ and ‘speaking through the … removal’ of speech that the government disapproves.

The Court ultimately determined that the banners were, in fact government speech, relying heavily on a 2015 U.S. Supreme Court case, Walker v. Texas Division, Sons of Confederate Veterans, Inc.,18 which was decided only a few months before the 11th Circuit’s decision in Mech.

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18 135 S. Ct. 2239 (2015),
Walker established a 3-prong analysis for differentiating government speech from private speech, which the 11th Circuit applied in Mech. In Walker, the “speech” at issue was a specialty license plate. In that case Texas Division of Sons of Confederate Veterans (SCV) applied to the Texas Motor Vehicles Board for a specialty license plate featuring the organization’s logo – a square Confederate battle flag framed by the words “Sons of Confederate Veterans 1896.” In determining that the decision of whether or not the denial of the logo was a permissible expression of government speech or a violation of the SCV’s First Amendment rights, Justice Breyer, writing for the Court, considered three factors: 1) the historical context of the speech (i.e., the specialty plates) and whether there is a history of state communication,19 2) how closely the plates were linked to the state and whether a reasonable observer would conclude that Texas agrees with the message displayed;20 and 3) whether the state had “direct control over the messages”.21

The 11th Circuit used the 3-prong test from Walker to reach its finding in Mech. First, it considered the historical context of the banners. The Court determined that there was no relevant history, due to the “relatively recent vintage” of the banner program. While the Court maintained that this “absence of historical evidence” weighed in favor of Mech, it also determined that that factor, alone, was not determinative, holding that “a long historical pedigree is not a prerequisite for government speech.” Thus, the Court went on to the second factor.

In determining whether an observer would reasonably believe that the school had endorsed the message, the Court noted that the banners are hung on school fences and that government property

19 Finding that “state speech has appeared on Texas plates for decades.”
20 Finding that the plates serve the official government purposes of registration and identification, that the state name appears on every plate, that car owners are required to display them, and that Texas owns both the plates and the designs themselves.
21 Finding that the state did maintain significant control over the message due to the fact that Board approval was required for each and every design, the state dictates the design, typeface, color and alphanumeric pattern for all license plates, and that the stated had, in fact, rejected at least a dozen designs.
is “often closely identified in the public mind with the government that owns the land.”\textsuperscript{22} This consideration is somewhat challenging with regards to school speech cases, due to the fact that, if this were the only consideration applied in the analysis, anything displayed on school property could be considered to meet this second prong of the \textit{Walker} test. However, the 11\textsuperscript{th} Circuit also went on to note that the “governmental nature” of the banners is, indeed, “clear from their faces”\textsuperscript{23} due to the fact that the banners bear the school’s initials, are printed in the school’s color, and identify the sponsor as a “Partner in Excellence.”

Finally, the 11\textsuperscript{th} Circuit held that the banners did meet the government-control prong of the test due to the fact that, similar to the Texas Motor Vehicles Board in \textit{Walker}, the school controlled the design, typeface and color of the banners. In addition, the schools also dictated the information that the banners could contain, regulated their size and location and required the inclusion of the school’s initials and the “Partner in Excellence” message.\textsuperscript{24} Finally, the school principals were required to approve every banner. The Court held that, as in \textit{Walker}, the fact that the private parties take part in the design of the message does not mean that the banner is not ultimately government speech.

The U.S. Supreme Court denied cert in \textit{Mech} in October of 2016,\textsuperscript{25} so, for at least those schools in the 11\textsuperscript{th} Circuit, a government-speech approach to raising revenue through advertising on school grounds in a closed forum is a viable option.

\textsuperscript{22} Quoting \textit{Summum}, 555 U.S. at 472, 129 S. Ct. at 1133.
\textsuperscript{23} \textit{Id.} at 555 U.S. at 471, 129 S. Ct. at 1133.
\textsuperscript{24} The Board’s current policy regarding the fence screen “Business Partnership Recognition” program was in effect at the time that the banner was removed by the District and is available here: \url{http://www.schoolboardpolicies.com/p/7.151}.
\textsuperscript{25} 137 S.Ct. 73 (2016).
The Government Speech Analysis Post-Mech

The cases that have been decided since Mech are interesting in that none of them have satisfied all three of the factors in the government speech analysis. Based upon the government speech cases that have arisen since Mech, the following generalizations may be made: 1) the historical context of the speech appears to be the least-significant of the three factors. Even in cases where there was no evidence of any historical cases or where there was a history of private speech, a successful argument of government speech can be made that, where the other two factors clearly indicate government speech, a finding will likely be made in favor of government speech. 2) the 8th Circuit, at least, has found that, where a fact pattern fails with regards to two of the factors, the government speech test fails, and the third factor need not even be considered.

A Florida case decided in June of 2017 and bound by Mech precedent, applied the government speech analysis to a state high school athletics association.26 In 2015, a Christian school that was playing in the football playoffs asked the Florida High School Athletic Association (hereinafter, “the Athletic Association”) if it could use the loudspeakers to broadcast a prayer prior to the start of a high school championship game in which the Christian school was playing. The Athletic Association had permitted such use of the loudspeakers in 2012 at another championship game. The Athletic Association, concerned about religious entanglement issues, in consultation with legal counsel, refused permission. The loudspeaker was used to broadcast messages from sponsors as well as music from the half-time shows of the bands from both schools playing in the game.

The Athletic Association had established formal administrative procedures in the form of a “Public Address Protocol” during the championship games, which stated that the announcer was considered a “bench official” for all championship games and which required the announcer to follow a specific script for promotional announcements, player introductions, and award ceremonies. Other announcements, pursuant to the “Public Address Protocol,” were limited to “those of a practical nature (e.g., announcing that a driver has left his/her vehicle lights on),” and “[m]essages provided by host school management.”27

In that case, the court found that one of the three factors – an examination of whether the use of the loudspeaker was historically government speech – “weighs in favor of [the] speech being private.”28 However, the court found that the speech was government speech based upon the endorsement and control factors. The loudspeaker remained in the exclusive control of the Athletic Association and was not open to private speech. In addition, while the Athletic Association did permit sponsorship messages, such messages were required to be pre-approved and were delivered according to a fixed script required by the Athletic Association. Thus, the court determined that the endorsement and control factors weighed in favor of government speech and outweighed the fact that the loudspeaker had not been historically used exclusively for government speech purposes. Thus, the court deemed the speech to be government speech.29 In addition, due to the Athletic Association’s announcer’s exclusive use the use of the loudspeaker, pursuant to the Association’s “Public Address Protocol,” the court determined that the use of the loudspeaker was a non-public forum.30

27 Id at 3.
28 Id at 7.
29 Id at 8.
30 Id at 10.
Another 2017 case out of the District of Columbia similarly found that, even where the historical context factor is inconclusive, facts demonstrating that a reasonable person would likely determine the speech to be endorsed by the government and that the government did exercise control over the speech let that court to hold that a First Amendment claim by the plaintiffs was likely to fail due to the fact that the speech was government speech.\textsuperscript{31} That case involved a controversial painting in the Congressional Art Contest, the winners of which were displayed in the tunnel between the U.S. Capitol building and the Cannon House Office Building.\textsuperscript{32}

It is important to note that the court, in that case, distinguished the Congressional Art Contest art from art that had been previously hung in areas of the congressional buildings due in part to the fact that the art hung as part of the Congressional Art Contest did not bear any type of disclaimers while other works of art commonly were displayed with a message specifically indicating that the viewpoints depicted did not represent the viewpoints of Congress. The art displayed as part of the Congressional Art Contest, however, did not contain such a disclaimer. The court, in that case, found that fact to be persuasive in determining that the art did, in fact, constitute government speech due, in part, to the fact that an observer would reasonably (and correctly) assume that the government had editorial control over the works displayed through the competition.\textsuperscript{33}

In a recently-decided case, the 8\textsuperscript{th} Circuit also considered the issue of government speech.\textsuperscript{34} In that case, an Iowa State University campus group supporting marijuana reform was denied an application to use the school’s logo on a T-shirt, due to the fact that the T-shirt would also contain

\textsuperscript{32} Id at 1.
\textsuperscript{33} Id at 8-10.
\textsuperscript{34} Gerlich v. Leath, 861 F.3d 697 (8th Cir. 2017)
a cannabis leaf. The University had approved the design by the group in the past, and, in response to an article in the local newspaper commenting on the university’s support of the group, the Director of the university’s Trademark Office stated that there appeared to be confusion regarding the fact that the school’s approval of a design, pursuant to the trademark guidelines, does not constitute “support.”

When the group submitted a request to be permitted to use the previously-approved design on a second batch of T-shirts, their request was put on hold until after the matter could be discussed at a cabinet meeting of university officials. After the meeting, the university denied the request. In addition, the group was told that the university would not approve any future designs containing a cannabis leaf, and the group was required to have all future designs reviewed by a senior university official prior to submitting them to the university’s Trademark Office. University officials testified that no other designs were put on hold, and the university had not denied approval for any other designs.

A few weeks after the approval was denied, the university revised the trademark guidelines to prohibit “designs that suggest promotion of the below listed items ... dangerous, illegal or unhealthy products, actions or behaviors; ... [or] drugs and drug paraphernalia that are illegal or unhealthful.”

The court, in that case, held that the university had created a limited public forum with regards to the use of the school’s intellectual property and that, consistent with the holding in *Summon*, the government speech test does not apply in situations where a limited public forum

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35 *Id* at 701.
36 *Id* at 703.
exists. In addition, the court goes on to analyze the government speech factors to further show that the facts do not support a finding of government speech. In its analysis, the court found that the first and second factors – the historical context of the speech and the public presumption of endorsement – simply do not apply. Indeed, the university had a history of permitting the use of its logo and other trademarked materials by over 800 student groups, and many designs were in contrast or opposition to each other. The court held that the fact that these two factors did not apply carried such weight in the analysis that a determination on the last factor was not necessary. Thus, the court held that the messaging on the t-shirts did not constitute government speech. Thus, a traditional limited open forum analysis was appropriate.

**Conclusion**

The forum analysis and the regulation of speech within a limited open forum are difficult concepts, and their application seems to be eternally elusive and ever-morphing through a vast body of caselaw. Thanks in large part to the court’s decision in Mech, a government-speech approach to raising revenue through advertising on school grounds in a closed forum is now a viable option. Since the government speech significantly simplifies the process of predictably regulating sponsorship content without opening the door to the confusing and hard-to-regulate arena of the limited public forum, school legal counsel would be well-served to recommend that their school clients tailor their advertising/sponsorship practices to satisfy the government speech

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37 *Id* at 707.
38 *Id* at 709.
analysis. As more and more schools adopt this type of approach, it will be interesting to see how other circuit courts interpret *Walker*.

Still, while the government speech model may be beneficial for schools on a legal construct level, the practical aspects of transitioning to a government speech system of advertising and sponsorship will not be easy and will need to be done with careful legal guidance. Schools may have difficulty ensuring the careful regulation of speech such that is required to ensure a successful government speech analysis. This is due partly to the fact that it is easy to confuse “recognition” in this context with “endorsement” and partly to the fact that it is not only a school’s written and stated policies and procedures that matter, but the school’s actual *practices*, as well.